Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. CC55/2020

Before: The Hon. Mr Justice Binns-Ward
Hearing: 10-12, 16-19, 24-25, 30-31 August;
1, 10 September 2021
Judgment: 28 September 2021

In the matter between:

THE STATE

and

ANTHONIO BOOYSEN	Accused 1
NADIEM THORPE	Accused 2
CHESLYN JOHNSON	Accused 3

JUDGMENT

BINNS-WARD J:

[1] The accused in this matter, Anthonio Booysen (accused 1), Nadiem Thorpe (accused 2) and Cheslyn Johnson (accused 3) were arraigned on the following charges:

1. Contravening s 9(2)(a), alternatively s 9(1)(a) of the Prevention of Organised Crime Act 121 of 1998. (Count 1.)
2. The murder of Cecilia Alexis Hartenberg (described in the indictment as 'a juvenile female person'). (Count 2.)
3. The murder of Melicia Claasen. (Count 3.)
4. The attempted murder of Ryno Anthony. (Count 4.)
5. The attempted murder of Brandon Graaf. (Count 5.)
6. The attempted murder of Jenene Rhodes. (Count 6.)
7. Contravening s 3 of the Firearms Control Act 60 of 2000 (possession of firearms without being the holder of a licence to do so). (Count 7.)
8. Contravening s 90 of the Firearms Control Act (unlawful possession of ammunition). (Count 8.)

Except for count 6, the charges all related to a shooting incident that took place outside a block of flats known as Gullhaven Court in the Robinvale area of Atlantis on the evening of 1 January 2020. Gullhaven Court is one of 12 apartment buildings depicted on the aerial photograph put in evidence as exh. F1. The buildings are reportedly referred to collectively as the 'Dura Flats'. Count 6 concerned a shooting incident at another of the blocks, Eagles Nest, that reportedly occurred soon after the first mentioned incident.

[2] The accused pleaded not guilty on all counts. Accused 1 elected not to give a plea explanation, but it soon became evident from the cross-examination of the state witnesses that he claimed to have been at home at the time of the shootings recovering from a marathon party at a house in nearby Beacon Hill to which he had gone on the previous day. Accused 2 explained that he had been shot in the ankle during the morning of the day in question and was not at the scenes where the shootings occurred. Accused 3 stated in explanation of his plea that he had been at home at the time of the incidents.

[3] Certain admissions by the accused, made in terms of s 220 of the Criminal Procedure Act 51 of 1977, were put in evidence in documentary form in Exh. A1-A3, respectively, at the commencement of the trial. The identically worded s 220 admissions documents signed by each of the accused referred in turn to certain other documents itemised therein as exhibits B' to 'H, the contents whereof were admitted as true and correct. The said documents were accordingly duly introduced as exhibits B to H, respectively.

[4] Exhibit B was the post-mortem examination report in respect of the aforementioned Cecilia Alexis Hartenberg, the deceased named in the charge of murder that was framed as the second count in the indictment. The examination, which was undertaken by Dr Many Chong, a pathologist in the employ of the Western Cape government, took place at Salt River, Cape Town, on 8 January 2020. The body was assessed as being that of a child of five years of age, whose death was reported to have been certified at 12h20 on 2 January 2020. The report recorded that the deceased had died as a result of a gunshot wound to the head. There was a gunshot entry wound on the right side of the forehead with an exit wound on the left side of the forehead. It is evident from the fact that a nasogastric tube was found inserted through the left nostril and an endotracheal tube was found in the mouth that the deceased probably received medical treatment before she died. This was confirmed later in the evidence of the investigating officer, Detective Sergeant Noordien, who testified that the child had been transferred to the Red Cross Children's Hospital, where a doctor informed him on 2 January 2020 that Cecilia was brain dead.

[5] Exhibit C was the post-mortem examination report in respect of the aforementioned Melicia Claasen, the deceased named in the charge of murder that was framed as the third count in the indictment. The examination, which was undertaken by Dr Laura Taylor, a registrar in forensic pathology in the employ of the Western Cape government, took place at Salt River, Cape Town, on 7 January 2020. The report indicated that the deceased had died as a result of a gunshot wound to the back. The corpse had two gunshot wounds, a perforating wound of the right arm and a penetrating wound to the back. In respect of the perforating wound, the bullet had entered and exited the deceased's right upper arm. The entry wound was to the front of the arm and the exit to the rear, which suggests that the deceased must have been facing towards the shooter when the wound was inflicted. In respect of the penetrative wound, it appears that the bullet, which was retrieved from the deceased's chest wall during the examination, perforated the deceased's right lung and her pericardial sac and lacerated her liver. A 800 ml haemothorax and

a 200 ml haemopericardium were recorded. A ‘gunshot defect in the 10th intercostal space on the right chest postero-laterally, as well as in the 7th intercostal space on the left anteriorly with surrounding haemorrhage’ were noted. The postmortem report indicates that the chest wound was inflicted when the bullet entered the deceased’s back, suggesting that she was facing away from the shooter when the shot was fired. The deceased also had abrasions above and to the side of her right eye. No evidence was adduced as to the likely cause of those injuries. The estimated age of the deceased was 34 years. It was recorded that her death had been certified at 21h30 on 1 January 2020.

[6] Exhibits D and E comprised of photographs taken at the aforementioned post-mortem examinations.

[7] Exhibit F consisted of a bundle of six consecutively numbered photographs of the Dura Flats area in Robinvale, Atlantis. The photographs most frequently referred to during the trial were photograph F1, which is an aerial depiction of the area, and photograph F6, which is also an aerial photograph that shows a more close-up depiction of the locality in the Dura Flats where the shootings occurred. The central part of exh. F 6 shows an open area within which there is a rectangular concrete slab, apparently all that is left of a crèche or youth centre that used to stand on the spot. The concrete slab appears to be known as ‘die blad’ by the locals, and I shall sometimes find it convenient to refer to it by that label in this judgment. It is helpful to interpret the photographs in exh. F with correlation to the street layout depicted in the Google Maps printouts that were admitted as exh.s P1-P3.

[8] Six cartridges were recovered at the scene of the shooting. Their location was pointed out by Cst (referred to in the oral evidence as Sgt) Matjan to W/O Jacobs, a police photographer and forensic analyst, between 00h20 and 01h40 on 2 January 2020. Jacobs took photographs of the scene showing where the cartridges were recovered and measured the distances between each one in the places that they were pointed out to him. Exh. G comprised the photographs taken by W/O Jacobs together with his covering affidavit giving a description of the points depicted on the photographs and the measurements between those points. All the casings were found on the aforementioned concrete slab. The photographs suggest that the casings were located in two groupings. Cartridges 1 to 3 in the first grouping and the others in the second grouping. The two groupings were about 2 to 3 metres apart. The casings in the first grouping were found lying

closer together than those in the second group, which suggests that the person whose shooting was responsible for the second group of cartridges was probably moving about a little more than the person whose shooting accounted for cartridges 1-3.

[9] That two firearms had been used in the shooting to which the recovered cartridges related was established on forensic analysis of the casings by W/O Hoffman, a forensic analyst in the ballistics section of the police forensic science laboratory. Her affidavits, which were produced in terms of 212 of the Criminal Procedure Act, were handed in as exh. H. Ms Hoffman established that cartridges 1-3 identified in W/O Jacobs' affidavit were fired from a different weapon to cartridges 4-6. All six cartridges were 9 mm Parabellum casings. The evidence suggests that there were seven gunshot wounds accounted for in the shooting incident, which serves to illustrate that the number of cartridges recovered should not be taken to equate with the number of shots fired. The disparity is not surprising bearing in mind that the exercise in which the casings were recovered occurred in the dead of night when visibility conditions would not have been ideal.

[10] The complainant on count 4, Ryno Anthony, was the first state witness. He is currently 27 years of age. He left school in standard 8 and since then has been involved in gang-related activity. He is a member of the 28 gang. He explained that while this is a known prison gang, it also operates outside the confines of the prisons. According to Anthony, the 28's were involved in an ongoing turf war in the area with the Ugly Americans, a rival gang known locally as the 'Terribles'. The turf war is over territory in which to trade in illicit drugs and generate an income.

[11] On the evening in question, at between 8 and 9 o'clock when it was dusk, he was standing on a concrete slab on the opposite side of Bunting Crescent from Gullhaven Court conversing with Melicia Claasen, the deceased in count 3, when he felt someone grabbing him around the neck from behind. He pushed the person away using his elbow and, as he did so, heard a shot going off. He sustained a gunshot wound low down on the right side of his back. As he pushed his assailant away from him, he looked back and saw that it was accused 1. He had known accused 1 (whom he called 'Tony') for a number of years. They had been involved on opposing sides in the gang wars in the area. He said that accused 1 was a member of the Terribles.

[12] Anthony said that he then fled from the scene. As he was running away, he heard more shots being fired – he was unable to say how many there were. He sustained two more gunshot wounds as he fled. The second one was to the area under his left shoulder and the third passed through his neck from back to front. He collapsed after the third shot and only came to in the local hospital. He heard after his release from hospital that Melicia Claasen had been killed. The witness said that when he looked back when the second shot went off he saw someone he knew by the name of Saadje standing 4 to 5 metres behind Tony. Saadje was holding a pistol, but he did not see him firing it. He confirmed that Saadje (whose proper name is Nishaad van Niekerk) was not one of the accused.

[13] The witness described that there were a number of other persons gathered at various spots on the concrete slab when the shooting incident took place. He mentioned someone called Maudlin who had been with other persons in one area of the slab and some 'Rastas' (Rastafarians) in another area. The atmosphere was reportedly one of New Year festivity. People were braaiing, drinking and making music. The area was illuminated by light from the nearby apartments and street lighting. He said that the lighting was good enough to be able to recognise a person from a distance of about 10 metres, although I must say I place little confidence in the accuracy of the witnesses' estimations of distance.

[14] Asked whether he could think of any reason for having been targeted in the shooting incident, the witness said he thought it might have related to him having been an accused in a case involving the murder of two leading figures in the Terrible Americans. He said that he was acquitted on the charges and released from detention a few months earlier in August 2019. It was put to him by accused 1's representative that the shooting had in fact been an incident related to infighting between two factions of the Horribles gang. He replied that he was unaware of that.

[15] Anthony was taken to the Wesfleur Hospital in Atlantis after the shooting. He was transferred to the Groote Schuur Hospital in Cape Town later during the night, where he remained for five days before being discharged. He made a witness statement to the police at the Wesfleur Hospital before his transfer. The statement (exh. J) was put to him in cross-examination. It identified two of his alleged assailants (named as '6' and 'Saar'), but made no mention of 'Tony'. He pointed out that '6' was accused 3. Taxed on the omission of any mention

of ‘Tony’ by accused 1’s legal representative, the witness said that he had been in no fit state to make a statement on the night of the shooting and had told the detective as much.

[16] Anthony said that he was unable to accept the proposition put to him by accused 1’s representative that the accused had been at his mother’s house at […] Canary Place at the time of the shooting.

[17] The witness was asked in cross-examination whether he knew someone by the name of Wayne Florence. He said that Florence lived in the same block of flats as he did. He had not seen him on the slab that evening. In answer to a further question by accused 1’s attorney, Anthony identified someone known as ‘Wagga’ as the local leader of the 28’s gang. He denied that Wagga gave instructions to persons in the local community as to how they should testify in court cases. He also denied the proposition that he had been in an affair with Maudlin Solomons (another person on the list of state witnesses).

[18] Under questioning by counsel for accused 2, Anthony confirmed that he had not seen Nadiem Thorpe on the scene on the night of the shooting. This is understandable in the context of the evidence of another witness, Cherel Brandt, with whose evidence I shall treat in some detail later in this judgment. Suffice it to say that according to Ms Brandt’s evidence accused 2 appeared on the ‘blad’ later than accused 1 and 3 and at some stage after the shooting had begun. It is therefore conceivable, if Ms Brandt’s evidence were accepted, that Anthony would have fled or be in the process of fleeing from the scene when accused 2’s presence on the ‘blad’ first became visible.

[19] It was put to Anthony by counsel for accused 3 that his client would deny that his nickname was ‘6’. It was also pointed out by counsel for accused 3 that the witness had failed to identify accused 3 at a photo ID parade at which he had pointed out accused 1 and Saadje. The witness conceded that he had not done so. When accused 3’s photograph was pointed out to him as photograph 8 on page A20/7 of exh L, the witness said that the accused looked ‘different’ in that photograph. The witness was adamant under cross-examination that accused 3 had been on the scene at the shooting. Under re-examination the witness testified that he had been shown the ID photographs while he was still in hospital at Groote Schuur.

[20] The witness conceded that he was acquainted with Cherel Brandt, Maudlin Solomons, Jenene Rhodes and Desiree Adams. He said that Jenene and Desiree were sisters and that Jenene

and Cherel lived in the same block of flats that he did. He denied that that they (Jenene and Cherel) dealt in drugs for the 28's gang.

[21] Maudlin Solomons, a 19-year-old resident in the Gullhaven Court block of flats testified that she had been very close to Melicia Claasen during the latter's lifetime. She said that Melicia had been a bit older than she was. She had looked up to her. Melicia had been there for her whenever she needed her. She had been present at the scene when Melicia was shot.

[22] Ms Solomons testified that she was at a party at her flat (the location of which she indicated with a '2' on exh, F03) on the evening of 1 January when she received a message on her phone that Melicia was nearby and wishing to meet up with her. Melicia had apparently said that she first wanted to buy something to smoke ('n rookie') from the Rasta's. She went outside and found Melicia conversing with Ryno Anthony. Melicia asked her to wait while she finished talking to Anthony. She stood against the wall of the block of flats about 3 m [it was evident from other evidence that her estimate of 3 m was unreliable; the distance from the wall of the Gullhaven Court to the blad was more realistically in order of 10 m] away from the two while she waited for them to finish their conversation. She could see the Rastas in a group on Bunting Crescent outside the place where they lived. She indicated the Rastas' position with the mark R2 on exh F06. It was close to the place that had been marked as R by the previous witness, Ryno Anthony. Using the approximately 10 m distance from the block of flats to the 'blad' as a scale, the spot marked by the witness as R2 would be at least 20 m from the spot where she said she stood waiting for Ryno and Melicia to finish their conversation. She said that there were also several children playing at various places up and down Bunting Crescent. Cecelia Hartenberg was apparently one of those children, although the witness said that she had not seen her before the shooting.

[23] As she stood there, she noticed two figures approaching from the direction of a nearby park and as they drew closer and came into the better illuminated area of the slab recognised them as accused 1 and 3, whom she knew as Tony and Koela, respectively. She said that they were walking side by side and disputed the correctness of Ryno Anthony's evidence that the person with Tony had been 4 to 5 metres behind him. She knew that they were members of the Terrible Americans gang. When she gave her evidence, she volunteered, without being asked,

that she could not see which of them had the firearm. At a later stage she said that Tony (accused 1) had the firearm.

[24] Something about the two men's approach made Ms Solomons apprehend that something untoward was about to happen and she called out a warning, apparently to Ryno Anthony and Melicia Claasen. (Under cross-examination she said that she had called out to warn Melicia.) She then said she called out the warning because she saw the firearm being taken out. She said that she had called out something to the effect of '*pas op hier kom die jongens'*. She used the word '*jongens*' to refer to gangsters. She turned to run away from the scene and as she did so heard shots ring out. She said that although she wanted to run away, she hung back to see what would happen and saw accused 1 shoot at Ryno Anthony. Under cross-examination by accused 1's attorney she said that she had not immediately run away because she had not known to which side she should go, by which I understood her to mean that she was undecided what route would be best to take to get out of harm's way. When cross-examined on the same point by accused 3's counsel she said that she could not run away without Melicia. She said that Tony had been about an arm's length distance from Ryno when he fired the first shot. She described that Tony put one of his arms around Ryno's neck or upper body before the shot went off. She described seeing Ryno flee the scene into a passageway that she marked with a G on exh F 6. Under cross-examination she said that she had not seen Ryno running away. That would appear to be an instance of self-contradiction. It may be, however, that her evidence as to the route by which Ryno Anthony fled was predicated on inference from where he collapsed. If the witness was on the scene she would probably have been aware that Anthony was taken from the scene, apparently in an unconscious state, shortly after the shootings. Shots rang out continuously. She then ran home. She said that shots were still being fired when she reached home. She mentioned that people in the vicinity were making a commotion and shouting.

[25] When taxed on the fact that Ryno had not testified that he had heard her call out a warning, Ms Solomons said that he may not have heard her because there was music playing very loudly at the time.

[26] When things quietened down she went outside. Her sister told her that Melicia had been hit. Melicia was at the 'ai ai'. Other evidence explained that 'ai ai' is a term used locally for Rastafarians.

[27] Ms Solomons said that it was ‘very dark’ when the shooting happened but that the slab had been illuminated to some degree by the light thrown from a nearby streetlight on a pole that she indicated on exh F6.

[28] Ms Solomons identified accused 2 as the person she knew as ‘Ses’. She was adamant that was his nickname and did not budge on the point when it was pointed out that the previous witness had identified accused 3 as Ses. She had last seen accused 2 quite some time before the shooting incident and did not see him present when the shooting happened.

[29] She mentioned that the local gangs were the Fancy Boys and the Terrible Americans. The latter had their territory near the KFC. Ms Solomons confirmed that Melicia Claasen had lived in the area her entire life and that she was familiar with the gangs. She conceded that Melicia would have been able to see the two assailants approaching from the position in which she was standing talking to Ryno Anthony. She said that she had heard Melicia say something just before the first shot rang out but could not hear what it was because of the loud music.

[30] The attorney representing accused 1 directed attention to the statement that the witness had given the police and put it to her that in the statement she had identified 3 persons rather than only the two identified in her oral testimony. The statement was not produced. The witness conceded to the proposition and said that there was a lot that was incorrect in her statement. The implication was that the police had not properly recorded it. The third person named in the statement was Saadje. She said that the police had taken the statement from her at her home on the evening of the incident having been told by somebody that she had been on the scene. It would appear from her evidence that when the police interviewed her, they already had Tony’s name as one of the assailants. It emerged during her cross-examination by accused 3’s counsel that the witness had made two witness statements, one on 1 January 2020 and the other two days later on 3 January. She had named accused 1, 2 and 3 in her 1 January statement.

[31] She said she could not remember what the assailants had been wearing, but then on reflection seemed to think that one of them was wearing a black nike track suit top.

[32] The witness was also asked by accused 1’s representative whether she was acquainted with Wayne Florence, which she affirmed. Questioned by accused 3’s counsel, she said she could not say whether Florence had been there that evening. She had not seen him. It was put to

her that Florence had given a statement to the police in which he said he had spoken to Ryno. The witness said she did not know anything about that.

[33] It was put to Ms Solomons by accused 1's legal representative as well as counsel for accused 3 that she was a drug dealer for the Horribles gang and that she had instructions to testify against the accused. She denied the propositions and said that the only reason she was at the trial was to speak for Melicia and Cecilia Hartenberg (the deceased on count 2).

[34] Under cross-examination by counsel for accused 2 the witness confirmed that she had not seen accused 2 at the scene. She conceded that she had pointed accused 2 out as one of the assailants when she was shown a number of photographs by the police. The photo ID parade had taken place at her flat on 3 January 2020. She tried to explain her apparent misidentification of accused 2 by saying that she had been confused and could not picture Koela (accused 3) in her mind when she had erroneously pointed out accused 2's photograph. Under cross-examination by counsel for accused 3 the witness stated that she had mistaken accused 2 for accused 3 when she pointed out accused 2 at the photo ID. She claimed that the photograph of accused 2 made him appear to her like accused 3. She claimed to be certain, however, that it was accused 3 that she had seen with 'Tony'.

[35] In answer to questions put by Mr Vismer for accused 3, Ms Solomons said that Cherel Brandt had been around the corner from where she (i.e. Ms Solomons) had been standing against the wall at point N on exh F6 while Melicia Claasen had been speaking to Ryno Anthony. She indicated what she meant by 'around the corner' by marking the place with a D on exh F6. Point D is outside the Gullhaven flats on the opposite side of the building from the place that Ms Solomons had marked with a 2 on exh. F3. The evidence led during the trial suggested that ground floor apartments in the Dura Flats had front entrances on their courtyard facing frontages with backdoors on the opposite side of the apartment. The point marked by Ms Solomons with a 'D' would therefore be quite close to the front entrance of her ground floor apartment at no. […].

[36] It was pointed out in argument that Ms Solomons had stated in her evidence in chief that Ms Brandt was in Flamingo Court. That evidence was on the face of it contradicted by her evidence in respect of point D on exh F6. The apparent contradiction was not explored in cross-examination and it is difficult to make anything of it in the context of her unchallenged evidence as to Ms Brandt's position at point D at the time of the shooting.

[37] In answer to Mr Vismer's questions, Ms Solomons said that Leonora was her sister. She did not know if Leonora had been in the vicinity at the time. She said there were quite a lot of people around at the time. The purpose of the enquiry about Leonora did not emerge in the remainder of the trial.

[38] The state then called Mr Wayne Florence. He said that he lived in Darters' Place, which is one of the apartment blocks comprising the Dura Flats. He described the local area as being divided between the rival Terribles and Horribles gangs, but said that Darters Place, which was between the two gangs' respective turfs, was not under the regime of either gang. He knew the deceased Melicia Claasen because she had been his children's aunt. Florence did not proceed far with his evidence before it was necessary to stand him down because it was almost impossible to make out what he was saying. He apparently was suffering from tooth ache. Certainly, his jaw looked swollen on the left side.

[39] When the hearing resumed after a three-day break, Florence testified that on the evening in question, at between 7:00 and 8:00 p.m., he had gone to Melicia Claasen's flat in Eagles Nest to purchase dagga. As Melicia did not have any dagga to sell at the time, the two of them walked together to the place near Flamingo Court where Rastafarians ('Rastas') were known to sell the product. He said that Flamingo Court was in the Horribles' area.

[40] On the way to the Rastafarians, he and Melicia bumped into Ryno Anthony. That happened in the area where the concrete slab was. Ryno had emerged from the Gullhaven flats as he and Melicia walked up. Melicia and Ryno struck up a conversation with each other. He stood a few metres away waiting for Melicia and Ryno to finish talking. He knew Ryno to be a member of the Horribles gang. Ryno lived in the same block of flats that he did. Melicia and Ryno had their conversation while standing on the concrete block. He marked the spot where Ryno had been standing on exhibit F. His indication coincided with that which had previously been marked on the exhibit by Ryno. He marked the point where he had stood waiting for Melicia as E on exhibit F6.

[41] Florence testified that while he was waiting for Melicia shooting broke out. He looked up and saw the person who was shooting at Ryno. He recognized the shooter as Tony. He said that Tony had approached from behind Ryno. Melicia had been facing Ryno while they were talking. She was standing about 1,5 meters away from him. After freezing for a moment due to shock, he

then turned to run away. By the time he took flight, a number of shots had already gone off. He was unable to say precisely how many. He ran into a passageway behind the Gullhaven block of flats. He said that he had seen two persons shooting, but he did not know who the second shooter had been as he was unable to see his face because of the angle at which that person was relative to where he was standing. He said that the second shooter had been standing next to Tony, which is consistent with the situation that can be deduced objectively from the forensic and photographic evidence described earlier. He did not see the direction from which the two shooters had approached the concrete slab.

[42] Florence said that he knew Tony to be a member of the Terribles gang. He had seen him with members of that gang on many occasions, almost daily. He maintained that every time there was a shooting in the area Tony was involved. He said that even the children in the area knew that. He said that he used to see Tony shooting three times a week or even more. The shootings happened in broad daylight. He identified accused number one as Tony. When doing so he remarked that there was no need for the accused to remove his mask in the dock for identification purposes because he knew him well.

[43] Florence testified that when the shooting happened it was already dark, but that the lighting in the area was good enough for him to be able to see. He mentioned that there were streetlights on the sidewalk. However, he said that he could see flashes when the gunfire was happening because of the prevailing darkness. He conceded that he would not have been able to see the flashes had it been daylight.

[44] After the shooting stopped, he reconnected with Melicia. She was in the road adjoining the concrete block. She told him that she had been shot but he did not see any wound. He said that she and he then proceeded to where the Rastafarians were, where Melicia collapsed. She was taken to hospital by a neighbour, whom he named as Pulu.

[45] Under cross-examination by accused 1's representative, Florence said that he knows Maudlin Solomons but did not see her that evening. When confronted with Ryno Anthony's evidence that he had not seen Florence on that day, Florence said he was unable to explain why Ryno would have said that. He had greeted Ryno when they met. He was also unable to say why Maudlin should have said that she had seen Melicia come to the concrete slab from the direction

of the shop (marked as W on exh F6). He claimed that there was a shop on the way to the 'blad', and, in re-examination confirmed point W as the place where the shop was.

[46] If one studies the aerial photographs and maps put in evidence, one can see that anyone using Bunting Crescent to walk from Eagles Nest to the place where the Rastafarians were would go past the shop at point W. It is also evident from such a consideration that crossing the 'blad' from the direction of the shop would afford a shortcut at the junction of Bunting Crescent with the offshoot lane that runs past Gullhaven Court and the place where the Rastafarians were in the direction of Flamingo Place, which was marked by a witness as being at point G on exh. F6. The offshoot lane of which I speak is that marked with the words 'Flamingo Park' on Exh. P2. It is the section of road between Gullhaven Court and the 'blad', depicted inter alia on exh. F6, often referred to in the evidence as 'Bunting Street'.

[47] In the circumstances, I find nothing inconsistent between Florence's evidence and that of Maudlin Solomons concerning the latter's observation about the direction from which she had seen Melicia Claasen approach over the 'blad'.

[48] Florence could not explain why Maudlin had testified that she had not seen him on the scene. One would imagine that as they were reportedly walking together, Ms Solomons would have seen both of them when she saw Melicia Claasen approaching. When pressed on the point Florence said that their evidence might conflict because it was dark. It is also apparent that it was quite a busy scene. Maudlin had also not seen Cecilia Hartenberg at the scene, but she was undoubtedly there. If anything, the evidence by the two witnesses that they had not noticed each other at the scene lends a measure of assurance about the independence of their testimony and detracts from the notion propounded in their cross-examination, and that of the other persons who gave eye-witness evidence, that their evidence was fabricated and based on instructions given by the leaders of the Horribles.

[49] Florence also testified under cross-examination that a person could not walk in any area of the Dura Flats if he did not belong in that area. He asserted that if anyone did that they would be shot at. He said that he was able to go wherever he wanted because he knew people 'on both sides'.

[50] Florence admitted to knowing Wagga as the leader of the Horribles/ 28's. He denied dealing in drugs for Wagga. He said that Wagga comes to Eagles Nest daily. He professed to be

ignorant of the reason for the fights that take place between the Terribles and the Horribles. He claimed to be unaware that the gangs fought each other for turf.

[51] He said that did not know a person by the name of Cherel. He identified Jenene Rhodes as the mother of his children and said that one Desiree was Janene's sister.

[52] The next witness called by the state was Brandon Graaf, apparently also known as 'Skivvies'. He is a 34-year-old Rastafarian who said he was employed as a construction worker. His mother lives in Gullhaven Court, and he was living there at the time of the incident. He now lives somewhere else with 'other people'.

[53] Graaf said that on the night of the incident he was making potjiekos with some other Rastafarians outside a refuse bin storage hut between Gullhaven and Flamingo Place. Suddenly he heard shots being fired. There was a commotion with bullets flying everywhere and he felt himself being injured. The injury was to his lower left leg. He could tell that the shots were coming from the 'blad'. He saw three persons there who were shooting. He was able to see flashes from the weapons being fired. He said it was after 9 p.m. and dark, but there was light shining onto the 'blad'. He was unable to see the shooters' faces. Under cross-examination he for the first time volunteered that two of the three had their faces covered. He had mentioned earlier that two of the three had been wearing hoodies, but that would not ordinarily have obscured the wearers' faces. He claimed to have been able to see only their clothing. He purported to describe what each of the three had been wearing and their respective body builds. I find it unnecessary to go into any detail in this regard because his evidence was so vague and contradictory that I would not attach any weight to it unless it were corroborated by other satisfactory evidence. He described himself as having been shocked and confused. At another stage of his evidence, he said it had been so dark that he could not see sufficiently to cook the potjiekos, with the result that it had been inedible. He was demonstrably confabulating on the last point because he was still in the process of cooking the meal when he was shot and taken to hospital.

[54] Graaf elaborated his evidence by marking with the numbers 2-5 on exhibit F6 where the three persons whom he described as the shooters had been positioned when he saw them.

[55] He testified that he knew Melicia Claasen by sight, but that he did not see her in the vicinity at the time of the shooting. He also knew Ryno Anthony by his nickname Tete. He said he had also not seen Ryno at the time of the shooting.

[56] Graaf testified that the police took him to the hospital. He said that he had to wait to be treated there, so he left and went home where his mother ministered to his injury, which he said was just a flesh wound, with ointment and bandages. Pressed on why he had left the hospital, he said that it was because he was very drunk and in shock. According to Graaf, he and his fellow Rastafarians had been drinking a punch that they had made and left to ferment for three days. He confirmed that the Rastafarians habitually sold dagga from the spot where they had been making a potjie that evening.

[57] Graaf was a notably unimpressive witness. His evidence, insofar as it could safely be relied upon, went no further than to confirm that there was a shooting incident at the 'blad' on the evening of 1 January 2020 in which he was injured.

[58] The next witness was Jenene Rhodes, a resident of Eagles Nest flats, where she occupies an apartment at no. […]. She is 39 years old and has lived all her life in the Dura Flats. She said that Eagles Nest fell within the Horribles gang's territory. She identified the blocks of flats associated with the rival Terribles gang as Albatross Place, Babblers' Place and Canary Place. She said that, amongst themselves, the residents of the Dura Flats were classified by the areas in which they lived and associated with the prevailing gangs there irrespective of whether they were gang members or not. Having lived in the community all her life, she knew who belonged to each of the opposing gangs. Melicia Claasen was her niece, the daughter of her sister Mary Claasen. Melicia lived at […] Eagles Nest.

[59] Asked whether she knew the accused, she pointed out accused 1, who was referred to by all the other witnesses who identified him as 'Tony', calling him 'Koela'. She said that she did not know accused 2. She pointed out accused 3 as 'Tony', whereas other witnesses had called that accused 'Koela'. Later in her evidence she explained that although she knew both men by sight she had not known their names at the time of the incident and had been told their names by youngsters of the area. She later added that she had heard of Koela by name for some time. She said that her sister Desiree had told her that same evening that Koela was Tollie's son. She said that Desiree had been standing with her at the time that the person she called Koela had fired a shot towards her.

[60] She said that she knew accused 3, whom she had called 'Tony', having seen him grow up in the area. She said that he used to sport Rasta hair in the past, although he did not have that

hairstyle at the time of the shooting. She also said that he used to visit his cousins in Crow Court and that his father had been a soccer player. His mother was friendly with people living at Eagles Nest. The witness was not cross-examined on these details given in respect of accused 3.

[61] Jenene Rhodes testified that on the evening in question she and various members of her family were making potjiekos outside her flat at Eagles Nest. She said that they began preparing the potjie at about 8 p.m.. While they were busy with the preparation of the food, she sent her 12-year-old son to the tuckshop (Mobil) in Bunting Crescent. Shortly after her son had left, she heard shots being fired. She ran in the direction of the gunfire to see if she could see her son. As she reached the corner of Eagles Nest someone called out '*Hier kom hulle*', which she understood to be a reference to the persons who had been shooting. She, together with the crowd of other people in the vicinity, ran for safety. She managed to get inside her flat and looked out through the window of her front room. She saw two men running through the courtyard of Eagles Nest in the direction of the nearby main road, identified by a later witness as Charel Uys Drive (the position of which is depicted on exh.s P1 and P2).

[62] She said that she recognised the two men. She was familiar with them as people from the area. They were members of the Terribles gang. She could see from their demeanour that they had been involved in the shooting. The words she used were '*Ek kon sien hulle was wild*'. She ran out of her flat and swore at them from the entrance to her part of the apartment block. She said one off them (whom she identified as 'Koela' -i.e. accused 1) turned around and fired a shot towards her. She said that there was no difficulty with visibility. It was dusk, not completely dark yet, and there were lights illuminating the courtyard.

[63] She said that she went to the scene of the shooting afterwards and saw Melicia's body lying there in somebody's yard. She thought the yard belonged to a Rasta. It was at a maisonette attached to Flamingo Court.

[64] Under cross-examination by accused 1's attorney, the witness said that she had known Ryno Anthony for about 15 years and that she had children by Wayne Florence. She also knew who Wagga was. Although she had been dealing in drugs at that time, she denied having done so for Wagga. She said that she did not know if Wagga was a gang leader but volunteered that Ryno Anthony would be able to say whether he was or not. She was aware that the 28's and the Horribles went under the British flag. Mr Halday, for accused 1, pointed out that the

weatherproof jacket that the witness was wearing had a Union Jack label on the right sleeve. The witness explained that it was not her jacket but one that she had borrowed to come to court. The day on which she testified was wet and wintery.

[65] The witness was more confident in her delivery than most of the other lay witnesses. She was not upset in cross-examination. The only troubling aspect to her evidence was her identification of accused 1 as 'Koela' and accused 3 as 'Tony', whereas all the other witnesses had the names the other way round.

[66] Jenene Rhodes was followed in the witness box by her older sister, Desiree Adams. Ms Adams looked much older than Jenene. She confirmed that she was 55 years old, which makes her Jenene's senior by 16 years. .

[67] Ms Adams said that she was at Jenene's flat on the evening in question, where potjiekos was being prepared. She arrived there at about 8:30 p.m., when a start on the preparation of the food had already been made. She estimated that it was at about 9:00 p.m. that she heard shots being fired. She jumped up to run in the direction of the gunfire. She explained that people regularly did that when there was gunfire in the area. She said they did so in order to see what was going on and if anyone had been hit; in other words, out of curiosity. When she reached the corner of the Eagles Nest building, she heard someone shouting '*Hier kom hulle*'. There was no evidence as to from which direction the person who called out had seen the suspected shooters approaching. If the shooters had run from the 'blad' into the passageway near the shop as described by Cherel Brandt, that would have taken them into Courser Ave, which joins up with Bunting Crescent in the proximity of Eagles Nest.

[68] Along with a number of other apparently curious people, Ms Adams then turned around and stampeded back in a panic from where they had come. Her retreat was slowed up by children blocking her way and she was consequently unable to get into Jenene's flat soon enough and had to take cover behind a wall in the stairwell a short distance away from Jenene's front door. She demonstrated how she had stood there pressed against the wall with her eyes shut, apparently hoping desperately that she would not be seen as she heard the persons whom she believed to have been the shooters running past through the courtyard that divides Eagles Nest from the neighbouring block of flats, Darters' Place. She said that her brother Jermayne had also not been able to get back soon enough to go into Jenene's flat and that he took shelter up the stairs.

[69] Ms Adams said she then noticed Jenene emerging from her flat. I assume that she must have opened her eyes when she heard the door opening. Jenene went to peer out from the entrance to that part of the flats. Ms Adams joined her and also looked out. She saw two men, each of them carrying a firearm. Jenene swore at the two men who had run past in the courtyard, at which one of them turned around and fired a shot in their direction. She said that the men carried on running 'in their direction' ('*in hulle rigting*'), by which the witness meant in the direction of Charel Uys Drive which would take them into the Terribles gang's territory. She said that she knew both men from the area. She knew them as persons who had been involved in gunfights. She identified them as Tony and Koela. She said Koela (by which she, unlike her sister, meant accused 3) was the one who had turned and fired a shot in Jenene Rhodes' direction. She said that she had recognised Tony by his height. In re-examination by the prosecutor, Ms Adams stated that when Koela had fired the shot, Tony had also turned and looked back over his shoulder. Under further questioning by accused 1's representative, she maintained that Tony and Koela were always seen together. They are 'the hitmen', she said of them.

[70] The witness indicated that she knew accused 2 as 'Ses', but she was sure he was not one of the two men she had seen running through the courtyard.

[71] She said that she had learned later that Melicia Claasen had been killed in the shooting, but she had not herself gone to the scene.

[72] Desiree Adams admitted under cross-examination by accused 1's legal representative that her daughter had been arrested for unlawful possession of two firearms. She denied that the firearms were Wagga's. She vehemently denied a proposition put to her by counsel for accused 3 that she and her sister were accused in a pending murder case.

[73] Mr Jermayne Rhodes, the brother of the Jenene Rhodes and Desiree Adams testified next. He said that he was at the family gathering at Eagles Nest that evening. He was expecting his son to arrive from the airport. He anticipated that his son would arrive just after 8 o'clock. After his son's arrival, and when his son had gone off to greet some of his friends nearby, Rhodes heard the sound of gunfire from the direction of Flamingo Place. That happened about five minutes after his son had gone off from Eagles Nest in the direction of Bunting Crescent. Concerned about his son's safety he ran through the courtyard in the direction of Bunting Crescent. As he

did so, he saw two men coming in the opposite direction. He noticed that they had emerged from the passageway between the end of the Eagles Nest block of flats and the maisonette at the entrance to Eagles Nest from Bunting Crescent. He said that as they came towards him a shot went off. No other witness described hearing this shot. Rhodes took cover in the stairwell, near where his sister Desiree was also sheltering.

[74] He said that he noticed as the men ran past the entrance area where he was sheltering that both were carrying handguns. He used the word 'pistols'.

[75] He said that Jenene Rhodes came out of her flat and swore at the men, at which a shot was fired at her from the Charel Uys Drive end of the courtyard.

[76] Mr Rhodes said that everything had happened so quickly that he did not have the opportunity to be able to recognize the two men. He described the conditions as dusk ('skemer') but said there was adequate lighting in the courtyard from streetlights and lights mounted outside the flats.

[77] Under cross-examination he said that he had not heard anyone calling '*Hier kom hulle*', as described by his sisters.

[78] The identification by Jenene Rhodes and Desiree Adams of accused 1 and 3 was suspect because their report about the shooting at Eagles Nest was made more than a month after the incident. The delay that attended their report was not revealed until the investigating officer gave evidence at a later stage of the trial, and it was not explained. There was also the mix-up in Jenene Rhodes calling accused 1 'Koela' and accused 3 'Tony'. I accept that she did, however, give other details about accused 3 that suggested that she did know who she was talking about even, if she got his name wrong. It is was nevertheless significant that Ms Rhodes and Ms Adams identified different people as the shooter at Eagles Nest. The former said it was accused 1 and the latter said it was accused 3. It was also notable that none of the witnesses to the shooting at the 'blad' testified to hearing further shots after the shooters had run away from there. Eagles Nest is quite close to the 'blad' and there can be little doubt that shots fired at Eagles Nest would have been audible at the 'blad' in ordinary circumstances. I do acknowledge, however, that there was evidence that loud music was being played in the area which might have affected the position.

[79] In all the circumstances I consider that it would be unsafe to found a conviction of any of the accused on count 6 on the basis of the evidence of Ms Rhodes and Ms Adams. The state correctly conceded as much, and Ms van der Merwe intimated in her address that the state did not persist in pressing for a conviction on that count.

[80] Constable Adrian Elias of the SA Police Service stationed at Atlantis testified that he had been on vehicular patrol in the area on the night of 1 January 2020 together with his colleague Sergeant Matjan when he received a radio message concerning a shooting incident at Dura Court (which is one of the collective names for the Dura Flats). The report had been received from Flamingo Park. It took him approximately 10 minutes to reach the scene, where he found an injured man (evidently Ryno Anthony) on the side of the road that leads past Gullhaven Court towards Flamingo Place. There was a congregation of people on the scene when he got there. He put his time of arrival at 21h35. He said the area of the shooting was well enough illuminated for him to be able see everything. He said he was also assisted by the headlights of his vehicle. He mentioned that there were streetlights in Bunting Crescent and that each block of flats in Dura Court usually had a bright 'council light' above the name of the block on the exterior of the buildings. It was pointed out to him in cross-examination that no such light could be seen on the exterior of Falcon Place in exh F6. It is noteworthy, however, that the exterior wall of Falcon Place does not overlook a road as most of the end walls of the other blocks of flats do, and as the end of Gullhaven Court does.

[81] He said that no sooner had the police vehicle come to a standstill, than members of the public loaded Ryno Anthony into the vehicle. He said that he and his colleague were on the scene for no more than three minutes. There were no other policemen there at the time. He and his colleague then transported Anthony to the nearby Wesfleur Hospital, which I gathered was on Charel Uys Drive not that far, as the crow flies, from the scene of the shooting. Det Sgt Noordien subsequently confirmed that the hospital is adjacent to the magistrates' court complex. The situation of the hospital is also indicated on Exh.s P1 and P3.

[82] While Cst. Elias was at the hospital he was approached by Brandon Graaf who reported that he had also been injured in the shooting incident. He noticed that Graaf appeared to have an injury on his leg. The place of the injury was covered by some form of makeshift bandaging through which blood could be seen to have seeped.

[83] He viewed the corpse of Melicia Claasen at the hospital. He also saw Cecilia Hartenberg, who was in an unresponsive condition.

[84] Elias testified that the Dura Flats were notorious for gang activity and that shootings occurred there virtually daily. He had been stationed in Atlantis for nine years when he gave evidence. He said that the community had no confidence in the local police force and frequently reported matters to the police station in nearby Melkbosstrand, rather than to the Atlantis police station.

[85] Ms Cherel Brandt, a 20 year old resident of the Dura Flats was on the witness stand for the entire day of the seventh day of the trial.

[86] Unlike the preceding lay witnesses, she had not lived in Atlantis all her life. She came to the area at the age of 14 from Beaufort West. She finished her schooling in standard 9 at the Atlantis Secondary School. She said that she had been a friend of the earlier witness, Maudlin Solomons, since 2014. She attended a party at Maudlin's home at […] Gullhaven Court on the evening of 1 January 2020. She arrived at the party at between 4 and 5 p.m..

[87] At some stage Ryno Anthony, whom she called by his nickname 'Tete', also arrived at the party. Ryno and Maudlin went outside for a smoke. They mentioned to Ms Brandt that they would let her know when she could join them. After waiting about five minutes she went out to see why they were taking so long. When she emerged from Gullhaven Court she saw Ryno standing on the 'blad' chatting to Melicia Claasen. When asked to indicate on exh. F6 where Ryno had been standing on the 'blad' she marked a place more or less in the same place that previous witnesses had indicated he had been when they saw him speaking to Melicia. She knew Melicia Claasen as the aunt of her friend, Mu'nas.

[88] As Ms Brandt walked towards the 'blad' she saw two men ('*ouens*') approaching out of the darkness over the 'blad' from the direction of the park or playground situated beyond the 'blad'. The park is clearly depicted in the photograph exh. F1 It is on the corner of Charel Uys Drive and Reyersdal Drive, opposite the white roofed complex marked on the exhibit with an 'H' that was identified in the evidence as the Atlantis magistrates' court.

[89] The men were coming towards Ryno Anthony from behind him. Ms Brandt sensed something to be amiss because people never came through the playground at that time of day.

Her apprehension of danger made her call out a warning for Ryno to watch out and look behind him.

[90] One knows from the other evidence that someone approaching through the park from the direction of Charel Uys Avenue could well be coming into the Horribles territory from the Terribles' area. It was made very evident from the testimony adduced during the trial as a whole that any resident of Dura Court would have their antennae finely attuned to indicators of potential inter-gang violence breaking out. The undisputed facts of this case illustrate the potentially fatal consequences of being caught in the crossfire in such eventualities. It does not take much imagination to understand that in such conditions a high state of alertness would be part of everyone's survival instincts.

[91] The two men who approached from the park had what she referred to as 'Pagad doeks' wrapped over the top of their heads and covering their mouths and lower faces rather as if they had been wearing the sort of face masks with which we are all now all too familiar. She explained that a 'Pagad doek' is a type of checked scarf, also known as a 'Palestinian scarf'. As she watched them, and simultaneously with her shout to Ryno, the two men pulled off their headdress and began shooting at Ryno Anthony. She recognised the shooters as accused 1 (whom she called Tony) and accused 3 (whom she named as Koela). She marked as P on exh F6 the place where the two men were when they started shooting.

[92] At this, the witness ran back into Maudlin Solomon's flat. Maudlin was not in the flat when she got there. She then went out again to see what was going on and if anyone had been hit. Ms Brandt said that the shooting was still going on when she re-emerged from the building.

[93] When she came out of the building, Ms Brandt saw Nadiem (to whom she at times also referred as 'Ses') running over the 'blad'. She said that he had a weapon in his hand. She identified Nadiem as accused 2. At the same time, she noticed Maudlin Solomons emerging from the passageway behind Gullhaven Court (which is the same passageway as that into which Ryno Anthony testified he ran into when fleeing the shooters). She said that the three accused ran around the 'blad' almost as if they wanted people to see who they were (I understood the witness to be describing her perception of the accused's behaviour as a kind of showing off display) before they ran off over the tiled area and disappeared into the passageway near the shop marked with a W on exh F6. The passageway in question is clearly visible on exh F5. It leads from

Bunting Crescent into Courser Avenue, as can be seen on Exh. P1. As can also be seen from the maps and photographs, Courser Avenue then leads back into Bunting Crescent in the vicinity of Eagles Nest.

[94] Ms Brandt said that she knew all three accused by sight, having seen them around in the area. She had made their personal acquaintance two weeks or so before the shooting incident when they came to a gathering at one of her friend's houses. She mentioned that she had also seen them together, before the aforementioned gathering and after it, in the vicinity of the 'new Kentucky' at the Telkom building, the location of which had been marked by previous witness as U on exh F6.

[95] When it was put to her that the accused denied any such meeting, the witness rejected the proposition, pointing out that she had even taken a drive from the party with accused 1 and two others to the nearby area of Protea Park. The vehicle that they had gone there in was an Avanza driven by someone called Toontjie, who was a taxi driver. She said that accused 1 had gone briefly into a house at Protea Park while the rest of them waited in the car, and they had then all returned to the party. Accused 2 and 3 had remained at the party while they were away. She estimated that they had been away from the party on this expedition for between 15 and 20 minutes. When they returned from Protea Park, she did not see accused 2 but accused 3 was still there.

[96] The police took a statement from the witness on the night of the shooting. The time is given on the statement as 23h45. The statement, which was admitted as exh. M, contained a sentence to the effect that the witness had not seen who had been shooting: '*Ek het nie gesien wie skiet nie'*. That was, of course, inconsistent with her oral testimony at the trial. When taxed with the inconsistency, Ms Brandt said that when she made the statement she had not wanted to be involved in the case. She explained that she was afraid. That she did go in fear was borne out by the evidence that she was taken by the police less than two weeks later to a place of safety in Springbok, where she remained for about a month before deciding of her own accord to return to Atlantis. She said that she had been threatened by one 'Saadje' (Nishaad van Niekerk).

[97] Ms Brandt was also taxed in cross-examination with a second statement that she had given to the police in April 2020. It was suggested that making the second statement was irreconcilable with her evidence that she had been reluctant to be involved in the case. The

witness explained that she had made the second statement after she telephoned the detective investigating the case to reiterate that she did not want to be involved as a witness. She did that after having been threatened by her cousin, who is a member of the Terribles, that he would shoot her for putting his friends in gaol. The detective had told her that she could not withdraw from the case as she had already given a witness statement. The detective then came to see her to make a second statement because she had not described in her first statement how the accused had been dressed at the time of the shooting. The second statement does not contain anything about the accused's dress. The additional detail added in the second statement gave a description of the firearms that accused 1 and 2 had been carrying.

[98] The witness was unable to explain why, in the face of her oral testimony, the statement dealt with the appearance of the weapons the accused had been carrying, rather than with what they were wearing. I do not ascribe significant weight to her inability in this regard. It was apparent from the investigating officer's evidence, of which I shall treat presently, that he had been instructed by the prosecutor's office to seek further detail in a given respect in a supplementary witness statement to be obtained from Ms Brandt. It is clear from the statement that the investigating officer took that the further detail concerned whether she was able to describe with particularity the weapons that she had seen the suspects using. That Ms Brandt may have misremembered the nature of the extra detail that she had been asked about as pertaining to the suspect's clothing is neither here nor there. It became clear from the investigating officer's evidence that she was in an overwrought and traumatised condition when he interviewed her for the second statement.

[99] It was evident from her demeanour while testifying that Ms Brandt was under considerable strain and very obviously frightened. I noted that she frequently looked fearfully towards the dock and into the public gallery above the courtroom. I also noticed that the public gallery was notably fuller when she gave evidence than it had been on the preceding days of the trial.

[100] I found Ms Brandt to be a compelling witness. She put all three accused on the scene in a statement given to the police very shortly after the shooting. The time of her identification of the accused corresponded closely with the times of their arrest. There would have been little or no opportunity for anyone to prevail on her to falsely incriminate the accused. Despite the pressure

and threats to which she has been subject, she has remained consistent and steadfast as to which of the suspects she saw there.

[101] I also find it significant that she should in her statement have confirmed her identification of the accused with reference to having sat with them in a 'Company'. The 'Company' mentioned in her almost contemporaneously made police statement was obviously the gathering about which she gave convincing detail during her oral testimony. She knew exactly who she was talking about when she identified the suspects she had seen to the police shortly after the shooting incident.

[102] Ms Brandt's explanation for saying that she had not seen which of the accused had done the shooting was consistent with her persistent and very evident reluctance to be involved in the case. It is readily understandable that residents in the area who were witness to gang-related shootings would apprehend danger to themselves should they give incriminating evidence against those involved. As it was, the unchallenged evidence was that Ms Brandt's life was threatened more than once on account of her involvement as a witness. She impressed on the witness stand as very frightened but brave young woman.

[103] I do not find the fact that she was the only one of the eyewitnesses to describe that accused 1 and 3 wore scarves around their heads a valid basis to question the truth or reliability of Ms Brandt's evidence. The discrepancy between what she said she saw and what Ms Solomons described depends very much on the possible interval between the time that Ms Brandt first saw the approaching gunmen and the time that Ms Solomons did. It would need only a second's difference for Ms Brandt to have seen the men when they were still wearing the scarves and Ms Solomons to have first seen them when the scarves had been pulled off. Some form of disguise might explain why Melicia Claasen who, as discussed earlier, was in all probability facing the approaching gunmen did not recognise the danger before the shooting started.

[104] I find it significant that Ms Brandt did not incriminate all three of the accused as directly involved in the shooting. She put accused 2 on the scene after the shooting had stopped. While she testified to having seen accused 2 carrying what appeared to be a firearm, she did not claim to having seen him firing it, or indeed having been visibly present while the shooting was happening. Her discriminatory treatment of the respective degrees of involvement of the accused

in the events is inconsistent with the version of someone intent on giving falsely incriminating evidence.

[105] It is also significant that Ms Brandt was the only eyewitness who gave evidence not only of what she saw of the gunmen before the shooting and when it commenced, but also afterwards. Her description of the accused's behaviour in carrying out what one might call a victory parade before they ran off was the sort of detail that only the most imaginative of people might invent. It was very evident from her demeanour when describing that behaviour that the witness found it difficult to credit, indeed astonishing, that the accused should actually have wanted to be seen and recognised. It was evident from her testimony that Ms Brandt had the persons involved in the shooting in sight for considerably longer than the other eyewitnesses and that, of course, would have lessened the chances of her having been mistaken in her identification of them.

[106] The last witness called in the state's case was the investigating officer, Det Sgt Noordien. He has 18 years' service in the South African Police Service, and at all times material to the current case has been attached to the Anti-Gang Unit at Faure. He was assigned to the current case on 2 January 2020 because of the alleged connection of criminal gang activity in the shooting of a woman and a young child. There were already witness statements from Maudlin Solomons, Cherel Brandt and Ryno Anthony in the docket when he took it over from the Atlantis police.

[107] His first act after assuming his function as investigating officer was to visit Ryno Anthony at the Groote Schuur Hospital on the morning of 2 January 2020. He found Anthony on a drip, but in a well enough condition to be able to converse with him. He said that Anthony spoke slowly but coherently. Anthony confirmed that he had already given a witness statement. It appears that Anthony was asked to undertake a photo identification from 45 colour photographs that Mr Noordien showed to him. I have already dealt with the pointing out done by Anthony when I reviewed his evidence earlier in this judgment. Noordien said that the photo ID parades were done on 3 January 2020 at Groote Schuur Hospital and where Maudlin Solomons was living, respectively.

[108] Mr Noordien then proceeded to the Red Cross Children's hospital to ascertain the condition of Cecilia Hartenberg. I have already described the information that he was given there.

[109] The investigating officer testified that he was informed by the Atlantis police that two of the witnesses were being threatened. These were Maudlin Solomons and Cherel Brandt. Maudlin Solomons, who was already staying somewhere away from her usual place of residence, went into the witness protection scheme and Cherel Brandt preferred to be taken to a place of safety at a location of her own choice. Maudlin Solomons asked to be released from witness protection after a period of a few weeks, Noordien said it was less than two months.

[110] Mr Noordien explained that he had not been involved in arresting the accused, who had all been taken into custody in the early hours of 2 January 2020. (The evidence of the accused was that they were arrested before midnight on 1 January) He testified that someone by the name of Damian Johnson, otherwise known as 'Damme', had also been arrested. Nishaad van Niekerk, also known as Saadje, had been arrested later in the day. Johnson was released before the first court appearance and van Niekerk was let go after the investigating officer had confirmed with van Niekerk's family that he had been with them at Melkbosstrand at the relevant time. He conceded that he had not investigated the alibi defences of the accused. His reason for having done so in van Niekerk's case was that only one person (Anthony) had identified van Niekerk as having been involved.

[111] Noordien confirmed the essence of Cherel Brandt's evidence concerning the circumstances in which she had given her second witness statement. He said he had been instructed by the office of the Director of Public Prosecutions to obtain a further statement from her. He said that he had spoken to Cherel Brandt and her sister in the grounds of a church because they had been unwilling to have a police vehicle seen parked near their house. He described Cherel Brandt as frightened and in tears but he eventually persuaded to give her further cooperation. Cherel declined an offer that a case of intimidation could be opened against the persons who were threatening her.

[112] Mr Noordien also said that on the instructions of the office of the Director of Public Prosecutions he had double checked Anthony's identification of Saadje van Niekerk with the witness on 28 April 2020. He said that Anthony stuck to the identification he had given on the day of the incident.

[113] After initially stating that all three of the accused had distinguishing tattoo markings, Mr Noordien was able to describe only those he had seen on accused 1 and 2. He conceded that

he had not asked accused 3 whether he had any tattoos. Accused 1 and 2 both had tattoos suggesting their association with the Ugly Americans. Under questioning by accused 2's counsel, the witness confirmed that the accused had a bandage on his foot on 2 January 2020 and that the accused had explained that it was on account of an injury sustained in a shooting incident with a rival gang before that which is in issue in the current matter.

[114] Noordien disclosed that Jenene Rhodes and Desiree Adams had reported what had allegedly transpired at Eagles Nest on the night of 1 January 2020 at the Atlantis police station only on 5 February 2020.

[115] It was put to Mr Noordien that accused 3 had been assaulted before his interview with the witness for the purpose of taking a warned statement. Noordien said that he was unaware of that. The accused had not told him about being assaulted when he asked him whether he had been mistreated or subjected to undue influence to make a statement.

[116] The state closed its case after Mr Noordien completed his evidence. All three accused thereupon applied to be discharged in terms of s 174 of the Criminal Procedure Act. I refused the applications and indicated that my reason for doing so would be given later.

[117] It is trite that an accused person is entitled to his or her discharge at the close of the prosecution's case if at that stage there is no evidence upon which a reasonable court could convict him or her. A court seized of the question of the possible discharge of an accused at the close of the state's case is concerned with whether there is prima facie evidence that *could*, not *would*, sustain a conviction. The court does not concern itself in a discharge application in a determinative manner with questions of credibility; which is not to say that it will refuse a discharge if the only evidence against an accused is so obviously unreliable or lacking in credibility that there is no prospect of it standing muster at the end of the day.

[118] In the current case there was eyewitness testimony identifying all three accused as having been involved in the shooting incidents that gave rise to the charges brought against them. There was also evidence that all three of them were gang members and that the shootings were probably gang-related. I shall have to treat of that evidence determinatively in this judgment. Suffice it to say that whatever my findings concerning it might be now, at the end of the trial, it was not of the sort that could be rejected out of hand without the need to weigh its credibility in the manner that is generally considered inappropriate in an application in terms of s 174. On the

contrary, it was evidence that were it to be accepted at the end of the day was material upon which a reasonable court could bring in a conviction.

[119] After the dismissal of the applications in terms of s 174, all three of the accused chose to adduce evidence in their defence. It will be recalled that each of them maintained that they were somewhere else when the shootings happened.

[120] Accused 1 testified that he is 25 years old and that his usual place of residence is at [...] Canary Place in the Dura Flats part of Robinvale, Atlantis. He has lived there all his life. His parents and two sisters also live at that address. He has been a member of the Ugly Americans gang since he was 16. While in prison, he joined the 27's gang. He dealt in drugs for the Ugly Americans. He volunteered that he had previously been arrested on four separate occasions but had never been convicted because the charges had been withdrawn. He said that they were all gang-related cases. Ryno Anthony, the complainant on count 4 in the current matter, had been a complainant in one of the previous cases in which he had been detained. The charge had been one of attempted murder. He did not say whether that charge had also arisen from a shooting incident. He claimed that Ryno Anthony was a shooter for the Horribles, and mentioned that he had been arrested on a murder charge only a week or so after he (Anthony) had testified in the current matter. He said that he had witnessed first-hand Anthony's involvement in a shooting incident.

[121] Accused 1 confirmed the rivalry between the Terribles and the Horribles and said that they clashed whenever they encountered one another. He said that, if they had weapons on them, his gang would shoot at the Horribles. The rivalry was about 'turf' and drug dealing. He denied that the Ugly Americans had a gang leader. He maintained that the gang's activities were regulated by consensus between its members. Decisions were made at meetings of the gang's members. He denied that he was ever present at or involved in shooting incidents between the gangs. He was always at home he said. If, however, he happened to witness a shooting, he would just stand to one side and watch. He claimed to stick to his role in the gang which was to deal in drugs, the income from which was shared with the rest of the gang. He conceded that the Terribles sent shooting parties into the Horribles' 'territory' on occasion, but denied that he was ever part of such incursions. He conceded that the Terribles did have shooters, and allowed that members of the local community would get to know who the shooters were.

[122] He was friendly with both accused 2 and 3, who were also members of the Ugly Americans gang. Neither of them had any function in the gang. He said accused 2 just smoked dagga. Accused 3 worked at a factory. He said both of them were involved in taunting and throwing stones at the rival gang, but not in shooting at them. If correct, this evidence would suggest there would be little reason for persons connected with the opposing gang to falsely incriminate them.

[123] The accused said that he went to a party at a person called Eugene's house in the adjoining area of Beacon Hill on the afternoon of 31 December 2019 and only returned home the next day, where, deeply under the influence, he retired to bed until about 10:00 p.m.. He was unable to give the precise address at which the party took place. He said that his parents knew Eugene and that he had told them where he was going. When he got up at about 10 p.m. he indicated his intention to go out to buy a dagga cigarette and asked his mother for R2 to pay for it. She told him that she did not want him to go out because she had heard shooting outside. He went back to his room and lay on the bed and watched television in his bedroom. He said that he was still doing that when the police arrived at the flat to detain him. The accused testified that he was accordingly not outside at any stage on the night of 1 January 2020.

[124] He was unable to say how his parents had spent New Year's Day. When he arrived home from the party his mother had been in the front room. He was unable to say where his father was at the time, as he had not seen him. Only one of his sisters was at home when he returned, the other was out. He named Anthea as the sister who was out and Mishka as the one who had been at home in the front room with his mother. The accused's evidence that he did not know how his parents had spent the day was somewhat inconsistent with his father's subsequent evidence that he had complained to his son for not being present to help him with the braai fire.

[125] He said that his father was in the front room together with both of his sisters when he woke up late in the evening of 1 January 2020. He did not speak to his father at the time. He just walked through the room on the way to going to speak to his mother in the kitchen.

[126] Accused 1 said his parents knew that he was a gang member, but that his father did not know that he dealt in drugs. His mother, who works as a domestic worker in Melkbosstrand and is the sole breadwinner in the household, had not seen him deal in drugs, but she was not willing

to accept any financial contribution from him because she was not prepared to take ‘dirty money’ (Afriks. ‘*vuilgeld*’). He said that he did not sell drugs from home, but only in the street.

[127] Accused 1 stated that when the police came to his flat they did not inform him why they were arresting him. They merely instructed him to get dressed and said that they could talk at the police station. He said that when he arrived at the police station he was assaulted and then taken to the cells. After an hour or so he was collected from the cells and assaulted again. His evidence was that they (the police) ‘assaulted us again’. Asked what he meant by ‘us’, he said that referred to himself and the other two accused. (Other evidence in the trial suggested that the accused had been kept apart and had only seen each other some days after their arrest. Accused 1 in later evidence under cross-examination said that they had seen each other when Mr Noordien had come to interview them.) The police refused to tell him why he had been arrested. He was also forced sign a form in respect of the taking of his fingerprints. I suspect that the form the witness was referring to was probably in fact one in which he was asked to acknowledge that he had been informed of his rights upon having been arrested. He said that the form had not been read to him.

[128] Accused 1 testified that the investigating officer, Mr Noordien, had come to interview him on the fourth day after his arrest. Noordien explained who he was and what he was looking for from the accused. He informed him of the reason for his arrest. Amongst other matters, Noordien checked the accused for tattoos and identified the Ugly Americans tattoo marking on the accused’s back. Accused 1 confirmed that two other persons, Nashied van Niekerk (‘Saadje’) and Damien Johnson (accused 3’s brother) had also been arrested, but that they had been released.

[129] He initially ventured that the witnesses who had testified to having seen him at the shootings were speaking in relation to allegations against him which they had heard, and not as to what they had seen. He later asserted that the witnesses had testified against him because they were associated with a rival gang that was in competition with the Ugly Americans in the drug-dealing that goes on in the area. He went on to claim that the witnesses had been instructed to implicate him to get him out of the way.

[130] Accused 1 denied having been at a party a fortnight or so before his arrest that had also been attended by Cherel Brandt. He denied Ms Brandt’s evidence that he had left the party to travel in an Avanza vehicle to an address in Protea Park. He said that Ms Brandt’s family did

tasks for one Wagga, the leader of the Horribles. He knew her only from having seen her about in the Dura Flats area.

[131] He said that Maudlin Solomons had a boyfriend who is member of the Horribles. She also sold drugs for Wagga and worked as a cleaner for Wagga's wife. He indicated that Wayne Florence was also one of Wagga's workers. Under cross-examination he said that he used to see Florence travelling in a motor vehicle together with Wagga. That was not put to Florence when Florence testified. Accused 1 also said he saw Florence from time to time when Florence came to purchase drugs. I find it improbable that Florence would buy drugs from the Terribles if he were an associate of the leader of the Horribles-28's alliance. The accused's evidence in this regard tends to bear out Florence's claim that he was an 'independent', able to move freely on both sides of the gang divide.

[132] Accused 1 said that Florence would also see him washing cars at times. He did not know where Florence lived. Notably, in the context of his father's evidence that Florence sometimes worked as a tiler with him on building contracts, the accused said nothing about that connection. The father's evidence was that the accused was also employed by him on such contracts.

[133] Accused 1 testified that Jenene Rhodes dealt in drugs on Wagga's behalf and that her sister, Desiree Adams is the person who stores Wagga's ammunition for him. He said that he had heard it told that the shooting on the night of 1 January 2020 was part of a fracas between the Horribles and the Fancy Boys gang, who had previously been in alliance with one another. He believed that the shooting had been about 'cases', a reference to an apparent practice between the gangs to trade in the withdrawal of charges laid against their respective members.

[134] Accused 1 was not a good witness. His evidence was inconsistent and contradictory in material respects and implausible in others.

[135] He gave conflicting evidence about the time of his return from the party in Beacon Hill. He variously put the time of his return as in the morning and in the late afternoon. The conflict was not immaterial. It came to the fore when he was asked in cross-examination whether there had been a shooting incident between the Terribles and the Horribles on the morning of 1 January 2020. The reason that the prosecutor put the question was because it had been put to witnesses by accused 2's counsel that the latter had sustained a gunshot wound in such a shooting that morning. Accused 1 initially stated that there had *not* been a shooting but then went

on to say that he had been asleep at home that morning so that he was unable to say whether there had been one or not. He knew nothing about the incident in which accused 2's foot had reportedly been injured. He had not noticed accused 2's injury when in detention because when accused 2 passed by his cell he (accused 1) was too weak from being assaulted to be able to stand up to see his condition.

[136] Accused 1's father, Henrico Booysen, testified as a witness in support of his son's defence. He is a builder. He testified that he had previously worked for 17 years with H&I (Haw & Inglis) but had since been unemployed apart from the odd contract work that he had been able to get from time to time. He is 47 years of age and has lived in Atlantis for 32 years.

[137] Mr Booysen testified that his son had not been at home on 1 January 2020 as he had been at a party since the previous afternoon at the house in Beacon Hill of someone called Jerome or Jeremy; the witness seemed unsure of the name. Under cross-examination, he said that he knew where his son had gone because he had overheard him telling his mother. The house where the party was held was three houses away from the address at which accused 1's cousins live, and the accused had said that his cousins, Brandon, Jason and Benedict, would also be at the party.

[138] Mr Booysen said that accused 1 had been very drunk when he arrived home between 4 o'clock and 5 o'clock in the afternoon. The whole family had been at home at the time, including both of his daughters. His evidence in the latter regard was in conflict with that of the accused, who, it will be recalled, said that only one of his sisters had been at home when he returned.

[139] Mr Booysen had been outside in the courtyard of Canary Place chatting to a friend when accused 1 returned home, and he watched the accused swaying drunkenly up the stairs to the flat. The accused went straight to sleep in his room and awoke at about 10:00 p.m.. When the accused emerged from his slumber, he was hungry, and his mother dished some food up for him. He asked his mother for R2 to go the shop, but his mother said the shop would be closed and she did not want him going out in any event because there had been a shooting. He said accused 1 returned to his room and watched television.

[140] The police arrived sometime before 11 o'clock and asked where 'Tony' (accused 1) was. Mr Booysen mentioned that it was not the first time this had happened. The police had apparently previously come to the flat on several occasions looking for accused 1 after a

shooting had happened. It strikes me as unlikely that that would happen if, as accused 1 claimed, he never had any role to play in the gang shootings. That, of course, is only a factor bearing on accused 1's credibility. It does not carry any probative effect in respect of the shootings in issue in the current case. Accused 1 said that on some occasions they arrested him and on others only questioned him. Mr Booysen mentioned that whenever his son was detained a whole group of others were arrested at the same time.

[141] The witness said that he knew of Wagga by sight and that he was one of the gang members. As it subsequently emerged that there are at least two people who go by that name in the Dura Flats area, one of whom is associated with the Terribles and the other with the 28's gang, it was not clear to which Wagga the witness was referring. He also knew Ryno Anthony from the area and from the soccer field. It turned out that Mr Booysen had been a local soccer player and then a soccer coach. He confirmed that accused 3's father (Tollie) had also been a soccer player. He said that they had all played soccer together. He was also familiar with Wayne Florence, who sometimes worked with him as a tiler. He agreed that Florence came into the Terribles' area from time to time, but disputed Florence's claim that Darters' Place was neutral territory. Mr Booysen said that some Horribles gang members live there. That some Horribles resided in Darters' Place was actually consistent with Florence's evidence. It will be recalled that Florence testified that Ryno Anthony lived there.

[142] Mr Booysen said that he had spent the day at home on New Year's Day. He had made a braai in the inbuilt braai that he had built on his first-floor flat's balcony.

[143] Under cross-examination, the witness said that about 20 minutes after accused 1's return home he had gone upstairs and gone to the accused's room to speak to him. He said he stood in the doorway of his son's room while he was speaking to him. The accused was sitting on his bed. He went to ask his son where he had come from. He had not expected that his son would be away for so long at the party and was a little upset that he had not been home to help him with the braai earlier in the day. The accused told him that he had come from his cousins ('niggies'). The accused testified that one of his female cousins had dropped him off at Canary Place after the party. His father, for some reason, seemed to think that one of his male cousins had driven him home. The accused said nothing about this conversation with his father in his evidence and

indeed the occurrence of such a conversation is inconsistent with Mr Booysen's evidence that his son went straight to sleep after getting home in a deeply intoxicated state.

[144] Asked about accused 1's involvement in the Ugly Americans gang, Mr Booysen was noticeably reticent. He said that he had noticed a tattoo on him, but that when he asked his son about it he had not been given an answer. He professed not to be aware of his son's involvement in drug dealing. His evidence in this regard was unconvincing. It was evident from accused 1's own evidence that his mother found his gang-related activity as unacceptable, so much so that she refused to accept what she termed 'dirty money' from him. In the Robinvale context it was obvious that the dirty money concerned would be money obtained by involvement through dealing in drugs.

[145] It is inconceivable that Mrs Booysen's views and the reasons for them would not have been known to her husband. Indeed, Mr Booysen - having initially maintained he did not know why his wife would not accept money from accused 1 - when pressed on the point by questions from the bench, grudgingly conceded as much, but maintained that he had never seen his son dealing in drugs. He would go no further than to say that he had seen him with drug dealers. He sought to suggest that the accused made his living off the wages he was able to pay him when he employed him to work on the occasional building work contracts that he obtained.

[146] Mr Booysen said that he and his wife had laid a charge against Wagga of the Horribles gang during 2020 (i.e. while his son was in custody awaiting trial in the current matter) for firing two shots through the kitchen window of their flat. One of the shots had gone through the electricity meter. It had been necessary to lay a charge and obtain a case number in order to have the meter replaced. He gave that as 'one of the reasons' he reported the matter.

[147] Mr Booysen was asked by the prosecutor if he knew who the leader of the Terribles was in their area. There was a notable pause before he gave his answer, which was that he had not known that there was a leader. 'They are a group together' was his eventual reply. He said that he had sometimes seen the Terribles shooting when they had been shot at and that he had sometimes seen who was doing the shooting. He mentioned someone called Wagga shooting for the Terribles. It was pointed out that this was a different person from the Wagga often mentioned during the trial as the leader of the 28's or the Horribles.

[148] He confirmed that people do report to the police who they have seen being involved in shootings in the area. In the same breath he said that people were forced to lie about who had been involved. He then mentioned a recent incident involving Ryno Anthony and Wagga in respect of which at least Anthony was reportedly arrested for murder. He said that Anthony's uncle had told him that people were threatened as to what to say concerning the incident. The witness's evidence in this regard was hearsay. He did not appear to have any direct personal experience to support it. In the current case statements were made by Maudlin Solomons and Cherel Brandt identifying some of the accused within less than three hours of the incident. It is improbable that they would have received instructions so promptly. It is also clear that they were threatened not to make the statements, but rather for having made them. There would have been no objectively plausible reason for identifying the accused – more especially 2 and 3 - if they were inconsequential members of the Terribles as all three of the accused claimed. Accepting the accused's evidence makes it hard to see that there would be any advantage for the Horribles in a false incrimination of the accused.

[149] Mr Booysen claimed to know that amongst the Terribles on the other hand people do not get forced to give false evidence. This was a convenient indication of purported intimate knowledge by him of the Terribles' culture when it suits him or his son. It stands in contrast with his claims of ignorance when that suits him or his son.

[150] Accused's 1 father said that he knew that accused 2 lived at Crow Court. He said that accused 2's family live next door to him at Canary Place. He said he occasionally saw accused 2, whom he called 'Sessie', together with his son and that accused 2 occasionally visited at his flat. His son was also friends with accused 3, whom he knew as 'Koela'. He said that accused 3 also lived at Crow Court. Mr Booysen said that accused 3's mother was a friend of his. He mentioned that accused 3 had not lived at Crow Court very long.

[151] Mr Booysen claimed not to know where accused 3's family had lived before they moved into Crow Court. I find that improbable. He must have known accused 3's mother when she lived at Crow Court previously. He knew accused 3's father from soccer and claims to have been a friend of the mother. Accused 3's mother would in all likelihood have visited her mother, with whom she has since moved back in, at Crow Court regularly during the period that she lived in Sherwood Park/Saxonsea. Mr Booysen agreed that until the last two years, when a residential

extension was built, the community at the Dura Flats had been stable. He said ‘That’s why we all know each other’.

[152] Mr Booysen stated that he could not comment on Wayne Florence’s evidence that he had seen accused 1 involved in shooting incidents on a number of occasions. He said he did not have any knowledge of that. I found it notable that he did not suggest that Florence had fabricated his evidence or that he would have had any reason to do so.

[153] Mr Booysen admitted that he had sat in court listening to the evidence during the state’s case. He would therefore have been privy to the version put to the state’s witnesses on accused 1’s behalf. Whilst his demeanour in the witness stand was generally satisfactory, there were a few features in his evidence that called its truth and reliability in doubt. On the latter score it bears mention that he testified and reiterated under clarificatory questioning from the bench that he had worked for Haw & Inglis for 17 years until he left the company’s employ in 2000. When it was pointed out to him that his evidence in that regard was demonstrably incorrect for it would have involved him commencing work at the company when he was only eight or nine years old, he unconvincingly sought to extract himself from the difficulty by claiming to have worked in two separate periods for the company. The details he gave in that regard had him commencing his initial employment there in 1997 and then leaving in 2000 and returning in 2003 for a further period of seven years, giving him a total of 10 years at the company. The performance demonstrated that the witness was able to spout nonsense with a straight face.

[154] Accused 2 then came to the witness stand after accused 1 closed his case.

[155] Accused 2 is 20 years of age (born in August 2001) and has lived at […] Crow Court in the Dura Flats since he was 16. He had previously lived in a house at Cuckoo Avenue, also in Robinvale. He was educated at Protea Park Primary School and thereafter, to the equivalent of standard 9 level, at the School of Skills, where he was trained in spray painting. He has never been employed. He confirmed that his nickname was ‘Ses’ or ‘Sessie’.

[156] He testified that he was on his way to the shop opposite Canary Place at about 6:30 a.m. on the morning of 1 January 2020 when he was shot at and injured in his right foot. He had no idea who his attacker was. He said that he would have liked to have gone to hospital, but it was too dangerous to do so because the entrance to the hospital was visible from the area controlled by the Horribles. It may be deduced from that, I think, that he thought that his attackers were

members of the Horribles gang. He expressly said as much later in his evidence when he was being cross-examined.

[157] He said that he went to his aunt's place at […] Canary Place. His aunt cleaned his wound and removed the bullet from his foot. He did not receive any formal medical treatment. His injury healed without any residual effects.

[158] He smoked some dagga after his aunt had ministered to him and then went out into the courtyard of Canary Place where he spent the day drinking and celebrating the new year. Under cross-examination, he mentioned that his cousins Saadje and Pooksie had been part of the company. He did not see accused 1's father in the courtyard while he was at Canary Place. He stayed there until between 4:00 and 5:00 p.m., when he went home. He was drunk and under the influence of dagga by that time. He was unable to walk properly on his injured foot. He went to sleep when he got home and was awakened later that night when the police came looking for him.

[159] He said that the police colonel told him that he was just going to interrogate him at the police station and then bring him home. That did not happen, and he was kept in detention. He knew nothing about the shooting incident at the 'blad' and had no idea why Cherel Brandt should have testified that she had seen him there. He knew who Cherel Brandt was from having seen her at times at the KFC. He was not on speaking terms with her, but he knew her name. He claimed to have no knowledge of the party at which Cherel Brandt said she had met him a couple of weeks before the shooting incident. He also knew Maudlin Solomons as they had been at school together.

[160] Accused 2 admitted that he was a member of the Ugly Americans gang. He said that he had joined the gang in 2018. There were 15-20 members in total. He explained that he had joined it because he was 'classified' as if he were a gang member and not able to stay at school as a result. He said that there were no advantages to being a gang member and that he did not offer anything to the gang by his membership. He joined because he wanted to identify with the people he smoked dagga and played soccer with. Membership was also part of the ethos of the area. He said he bought his dagga from the Rastas with money given to him by his mother. Sometimes his friends gave him dagga. He did not buy the drug from the other gang members. He said that he was friendly with accused 1 and 3 both within and outside of the gang context.

He had been friends with accused 1 for four to five years and with accused 3, who was relatively new to the area, for two to three years.

[161] Accused 2 said that the gang sat as a group and decided who would be shot. He was sometimes present at such meetings. He said that they did not determine a date and time for a shooting. 'We just do it' were his words. He said that there was no decision on a revenge attack after he had been shot because everyone was not there. Everyone had to be together for a decision to be taken. Firearms were not always used. It all depended, he said. He could not specify by what criteria a decision to use them would be made.

[162] Accused 2 said that every gang member had his own job to do. He suggested that there were designated shooters. He claimed that his function was to keep a look out and to participate in verbally taunting (Afriks. '*om te skel*') the gang's opponents. In the event of a shooting, he would just sit at the corner and smoke dagga and wait for the others to report back on what had transpired. He said that no-one in the Horribles area would ever see him when there was a shooting there by the Terribles. Somewhat inconsistently with his initial evidence, he then claimed that he had no function in the gang. At another stage he identified himself as a 'soldier' for the gang, although he said that was not the term that was used.

[163] Accused 2 closed his case without calling any supporting witnesses.

[164] Accused 3 is 22 years of age. His home address is at […] Crow Court, Robinvale. He moved there with his mother and sibling (an older brother, Damien Johnson) from Athens Avenue in Saxonsea (which I initially misheard as 'Section C') in 2019. He lived there with his mother and grandmother. He reached grade 11 at the Saxonsea Secondary School in Atlantis. After completing his schooling in 2017, he obtained employment as a packer at a shop in Sunningdale. He worked there for over a year. In 2018 he obtained a new job, also as a packer, at Freddy Hirsch, a factory in Montagu Gardens, Cape Town, where he remained until August 2019. At the time of the incidents giving rise to the charges in the current matter he was unemployed and searching for work in Atlantis and beyond.

[165] He denied having been present at the shooting incidents on the night of 1 January 2020. He said that he had attended a 21st birthday party on Old Year's Night at an address in Saxonsea. He only returned home from the party at between 8 and 9 o'clock on the morning of New Year's Day. His mother was at home when he arrived there. He went straight to bed and was awakened

by one of his cousins sometime between noon and one o'clock. He then joined a family braai that was held at Crow Court. The braai went on until between five and six o'clock in the afternoon. He said he got very drunk at the braai and went back to bed. He was woken by his brother later in the night when the police came looking for Damian Johnson. The police took both him and his brother to the police station. They not told why they were being detained. They were told not to ask questions and that they could speak at the police station. He said he was given a 'klap'.

[166] Accused 3 said that at the police station he was assaulted to make him sign the 'aanklag blaai'. He said that his co-accused and his brother were also assaulted and then placed into separate cells. He was confined alone and kept in detention for five days before appearing in court on Monday, 6 January 2020. Det Sgt Noordien interviewed him on Saturday, 4 January. On the previous day (3 January) he was taken out of his cell and assaulted. He did not offer any details of by whom he was assaulted or what the reason for it could have been. He understood that his brother had been released on either 2 or 3 January 2020.

[167] Accused 3 asserted that the state witnesses had lied in their evidence incriminating him. He said that he did not know Maudlin Solomons, Cherel Brandt or Desiree Adams and denied that Jenene Rhodes could have seen him when she was shot at in the courtyard of Eagles Nest. Under cross-examination he said that he had never heard of Jenene or Desiree. He said that Cherel Brandt's evidence that she had encountered him together with accused 1 and 2 at a party sometime before the shootings was not true. He suggested that witnesses were instructed to falsely implicate people in the context of the gang rivalry between Horribles and the Fancy Boys on the one side and the Terribles on the other. He said getting people arrested on the basis of fabricated evidence was used as means of obtaining bargaining chips to get pending cases against other persons withdrawn. He admitted, however, that no-one had ever asked him to withdraw a case.

[168] The accused admitted to being a member of the Ugly Americans gang. He said he had become one in 2018 before he moved to Robinvale. He became a member after he lost his employment in Sunningdale when the business closed down. He was initially a member of the gang in Sherwood Park, which he described as being part of Saxonsea, and was recognized by the Robinvale group when he moved there. He said that he did not have any function within the gang. He did not deal in drugs, he did not help to protect the territory and he did not fight for the

Terribles against the Horribles. He also was not involved in any discussions by Terribles concerning attacks on the Horribles. He claimed not to be aware even that such discussions took place. If a shooting or a shouting match ('skellery') happened when he was around, he would disassociate himself from it and go to his mother's place. He stated that he did not spend much time with the gang as he stays at home a lot of the time and also spends time with his girlfriend. He admitted that he did learn about shootouts between the gangs after they happened. He would hear about these when he sat with his fellow gang members on the lawn in front of Canary Place opposite the KFC and the Telkom building. He admitted to having tattoos identifying his gang membership. He also had a tattoo on his right arm with the words 'Only god can judge me'.

[169] He said that the address at Crow Court where he lived was his grandmother's home. His parents had lived there when they first got married. His brother, Damien, was nicknamed 'Damma' and he was called 'Koela' after a name his grandfather used to call him by when he was a boy. He confirmed that his father, Raymond Johnson, was called 'Tollie'. His father remained living at Athens Ave in Saxonsea.

[170] Accused 3 also confirmed that he was friends with both accused 1 and 2 and sometimes walked around the area with them. Accused 2 also lived at Crow Court in a flat diagonally above his grandmother's place. He was aware that accused 1 dealt in drugs. He had seen him with 'smokkelgeld', which he described as a lot of R10 and R20 notes. He stated that he did not know what accused 1 did with the drug money. He maintained that it was not shared amongst the gang members. He professed to have no knowledge of who benefitted from the profits generated by the drug dealing. He explained that one did not have to belong to a gang to be able to sell drugs in the area. The only qualification was that you had to purchase your stock from the gang. He did know who had imposed that regime.

[171] The accused confirmed that shooting incidents happened frequently in the Robinvale area. He said they went over fights for territory. He professed to be unable to say why the gangs fought over territory.

[172] Accused 3 pointed out that some people joined a gang for protection against anyone harming them. He said that that was the reason he had joined a gang. His evidence in this regard was inconsistent with his earlier evidence to the effect that he had joined to be like his friends. Under questioning by accused 1's legal representative, he said that Atlantis was a difficult place

in which to live. He acknowledged that gang membership was a romanticised concept aided by movies in which gangs were glorified. He acceded to the proposition that gang membership boosted one's image even if one did not have a role within the gang.

[173] Accused 3 contradicted the evidence of many other witnesses who testified that people from the area controlled by one gang were made to feel uncomfortable and unsafe if they strayed in the area controlled by the opposing gang. He said he was unaware that people from the Horribles area were taunted ('geskel') when they walked to the KFC, which was situate in the Terribles area. He claimed it had never happened in his presence.

[174] Accused 3 said that after he was taken into custody by the police, and before being detained in a cell, he and the others who had been arrested had to stand together at the police station. He did not notice that accused 2's foot was injured, and he could not say whether accused 2 was wearing shoes or not. Accused 2 did not complain about his foot. He was detained in a separate cell in solitary confinement. In answer to a question by accused 2's counsel, accused 3 said that he had not had the opportunity before his arrest to hear about the shooting incident in which accused 2 was injured.

[175] Mrs Swindell Olivia Johnson, the mother of accused 3, testified in support of her son's defence. She confirmed his evidence as to his whereabouts on New Year's Day from the time he returned home at between 8 and 9 o'clock in the morning. She knew he had gone to a 21st party in Saxonsea, but did not know whose party it was. She said that at the end of the family braai that afternoon, the accused was deeply intoxicated and had thrown up. She had to make up a bed for him on the floor because he complained that his bed felt as if it was swirling.

[176] Mrs Johnson said that the police arrived sometime before midnight. They were looking for her son Damien. They went through to the room where Damien was with accused 3 and she heard the sound of someone being slapped about. The police took both her sons away and told her that they would be interviewed and then released.

[177] She went to the police station the following morning to enquire about her sons. She was told that they had been detained in connection with a shooting incident the previous night. When she pointed out that her sons had been at home, the police gave her no answer. Damien was released on Saturday, 4 January 2020.

[178] Mrs Johnson denied that she was well-known in the area. She said that she stayed at home most of the time and had only returned to Robinvale two years previously. But, as already noted, her mother lived there and she is likely to have visited regularly. The indications are that Saxonsea and Sherwood Park are not far from Robinvale. A marker in respect of Saxonsea Hardware & Gifts is shown on exhibit P3. It is not that far from the Wesfleur Hospital. She said that she knew Maudlin Solomons and Cherel Brandt only by sight. She initially said that she did not know any of the other state witnesses, but when questioned in more detail admitted to having previously seen Jenene Rhodes and Desiree Adams when she went to the mall ('sentrum') or they walked past where she lives.

[179] She said that she did not involve herself with the shootings in Robinvale. She said it was something new to her as Saxonsea, where she had lived between 2000 and 2019, was a very peaceful area. Her evidence about the peaceful character of Saxonsea struck me as somewhat at odds with her son's evidence that he had joined a gang while still living there because he felt in need of protection.

[180] Mrs Booysen was aware of a shooting incident that had happened near where she lived early on the morning of New Year's Day. She said it happened in the road behind her residence. She went out to investigate because she heard that someone had been shot. She learned that it was accused 2 who had been hit and that the Horribles had been shooting. She was not told who the shooter or shooters had been.

[181] She became aware of accused 3's gang membership when she noticed his tattoos. She said that she had asked him whether that was really the kind of life he wanted to live.

[182] Mrs Johnson admitted that she had attended court when Cherel Brandt was called to give evidence. I recall seeing the witness positioning herself prominently in the middle of the upstairs gallery on that occasion. She did not attend the trial on the preceding six days of evidence. Mrs Johnson said that she had no reason to think that Cherel Brandt would be frightened of her. She said that she had never had a conversation with her. She could not think of any reason why Ms Brandt or Maudlin Solomons would say that they had seen accused 3 involved in the shooting.

[183] Asked about how she covered her living expenses, Mrs Johnson said she had savings from her previous employment and she sold packs of chicken, mainly to other persons in Crow

Court. Her son, Damien, who is employed, also makes a contribution towards the household expenses.

[184] Mrs Johnson said that she never went into the Horribles area because stones would be thrown at her if she was seen there.

[185] That concluded the evidence.

[186] The foregoing summary highlights that the fundamental issues to be weighed in making the determination whether the state has proved its case against the accused beyond reasonable doubt are whether their identification by the eyewitnesses who gave evidence for the prosecution is credible and reliable and whether there is a reasonable possibility that their alibi defences could be true. It is important to appreciate that what, so stated, might appear to be two discrete questions are actually integral aspects of a single enquiry to be undertaken by the court. See in this regard *S v Ngcina* 2007 (1) SACR 19 (SCA) at para 18, where Navsa JA said:

> In [Hoffmann and Zeffert] *The South African Law of Evidence* [2003], p 151, the learned authors correctly point out that courts occasionally fall into the error of treating an alibi defence as a separate issue to the issue of identification. An alibi defence is essentially a denial of the prosecution's case on the issue of identification.
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> The learned authors state the following:
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> > 'As the Appellate Division has said in *R v Hlongwani* [sic] and *R v Khumalo en Andere* the correct approach is to consider the alibi in the light of the totality of the evidence and the court's impression of the witnesses. It is sufficient if it might reasonably be true. This does not mean that the court must consider the probability of the alibi in isolation. If someone says that he was in bed at midnight and no other evidence may be considered, it would be difficult to say that it could not reasonably be true, but if there is sufficiently strong evidence to show that he was in fact breaking into a shop, the court may consider that his story can safely be rejected.'

[187] This, in essence, is a recapitulation of the principled approach concerning the adjudication of cases in which the accused raises an alibi defence stated by Holmes AJA in *R v Hlongwane* 1959 (3) SA 337 (A) at 340-341:

> The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted. *R v Biya*, 1952 (4) SA 514 (AD). But it is important to point out that in applying this test, the alibi does not have to be considered in isolation. I do not consider that in *R v Masemang*, 1950 (2) SA 488 (AD),
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> Van den Heever, J.A., had this in mind when he said at pp. 494 and 495 that the trial Court had not rejected the accused's alibi evidence 'independently'. In my view he merely intended to point out that it is wrong for a trial Court to reason thus: 'I believe the Crown witnesses. *Ergo*, the alibi must be rejected.' See also *R v Tusini and Another*, 1953 (4) SA 406 (AD) at p. 414. The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses. In *Biya*'s case supra, Greenberg, J.A., said at p. 521 (the italics being mine)
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> '. . . *if on all the evidence* there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime'.

[188] These statements of principle make it clear that there is nothing exceptional or special in the assessment of the evidence required in alibi cases. The proper approach, in accordance with the oft-cited dicta of Nugent J in *S v Van der Meyden* 1999 (2) SA 79 (W) at 80H-82E, is that the court's judgment must be founded on a holistic consideration in an integrated manner of *all* the evidence adduced at the trial, and that a compartmentalised assessment of any part of the evidence would be misdirected. See also *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at para 7-8, *S v Trainor* 2003 (1) SACR 35 (SCA) at para 8-9 and *S v Heslop* 2007 (1) SACR 461 (SCA) at para 11.

[189] The dictum uttered in *S v Van Eck en 'n Ander* 1996 (1) SACR 130 (A) at 135e, a judgment referred to by counsel in argument, to the effect that an alibi can only be rejected if the state's evidence against the accused is overwhelming ('*oorweldigend sterk*'), falls to be qualified in the light of the aforementioned statements of principle. It was not, in my view, intended in any way to derogate from the well-entrenched authority of the passage from *Hlongwane* that I quoted earlier, and which, as I have noted, was essentially reiterated in *Ngcina* as well as any number of subsequent appeal court decisions and endorsed in one of the judgments in the Constitutional Court in *S v Thebus and Another* 2003 (6) SA 505 (CC) (in para 79, fn. 105).

[190] Indeed, the judgment in *Van Eck* cites *Hlongwane*, without qualification, as setting out '*die regsposisie aangaande 'n alibi'*. The reference in *Van Eck* to 'overwhelmingly strong evidence' does not posit a new standard of proof in criminal cases. The standard is that a conviction is justified only when the court is convinced beyond reasonable doubt that the evidence, considered in the holistic manner just referred to, has established the accused's guilt. It is obvious that a court cannot be convinced beyond reasonable doubt of an accused person's guilt when there is a reasonable possibility that the evidence adduced by the accused in support of his or her innocence could be true. It is also axiomatic, as a matter of logic, that a court does not have to actually believe an accused person's evidence for it to have to acknowledge the reasonable possibility that it could be true.

[191] Proof beyond reasonable doubt does not, however, equate to proof beyond any shadow of doubt. The following statement by Denning J (as he then was) in *Miller v Minister of Pensions* [1947] 2 All ER 372 has been quoted with on several occasions in our jurisprudence:

> 'It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt.'

In *S v Ntsele* 1998 (2) SACR 178 (SCA) at 182b-e, Eksteen JA remarked of that passage that '(o)*ns reg vereis insgelyks nie dat 'n hof slegs op absolute sekerheid sal handel nie, maar wel op geregverdigde en redelike oortuigings – niks meer en niks minder nie (S v Reddy and Others 1996 (2) SACR 1 (A) op 9d-e).*' The passage in *Reddy* that was referred to was part of a quotation from the second Lord Coleridge's address concerning the proper approach to circumstantial evidence in *R v Dickman* that went as follows: '*The law does not demand that you should act upon certainties alone ... . In our lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds ... . The law asks for no more and the law demands no less*'.

[192] In the circumstances of the state case's primary dependence on identification evidence, it is, of course, apposite in any review of applicable principles, also to acknowledge that such

evidence must always be weighed with some caution. A court must be astute to the danger of honest but mistaken identification. The following dicta in *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C are the locus classicus in this regard:

> 'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as *R. v Masemang*, 1950 (2) SA 488 (AD); *R. v Dladla and Others*, 1962 (1) SA 307 (AD) at p. 310C; *S. v Mehlape*, 1963 (2) SA 29 (AD).'

However, as the passage itself makes clear, the reliability of identification evidence is also not a compartmental question. It is an aspect to be weighed and considered in the light of the totality of the evidence in the case and the probabilities.

[193] The identification evidence given by Ryno Anthony was wholly unreliable. He initially identified his assailants as Accused 3 (misnamed by accused 2's nickname) and Saadje and then pointed out accused 1 and Saadje in a photo ID parade. In my view it is probable that Anthony was caught unawares when the shooting broke out. I accordingly consider that he probably would not have had much of an opportunity to take note of the identity of his assailants. I am surprised that the state did not lead any medical evidence concerning Anthony's injuries as that could have provided an objective indication of his likely position viv-a-vis the shooters when the shots were fired. The evidence from other eyewitnesses was that Anthony had his back to the shooters when they approached and that Melicia Claasen, to whom he was speaking at the time, had been facing him, which suggests she must having been facing towards the shooters as they approached. Some support for that evidence is given by the fact that one of the gunshot wounds sustained by Melicia Claasen had a frontal or anterior entry point.

[194] I have little doubt that Anthony would instinctively have started to flee the scene as soon as the shooting commenced; and even if he did look over his should as he ran, as he claimed to have done, the conditions, infused with panic and urgency as they would have been, would have been far from ideal for him to be able to make a reliable identification of the shooters even if they were people that he knew.

[195] The evidence suggests a background history of gang-related violence between Anthony and at least accused 1 and Saadje. I would not be surprised in the circumstances if the identification evidence he gave in statements to the investigators on the night of the incident and two days later in hospital was predicated on his suspicions, rather than his observations.

[196] Anthony was not asked how he came to be on the 'blad' at the time of the shooting. His evidence in chief and cross-examination was not led in a way that might corroborate the evidence of Cherel Brandt that he had been at the party at Maudlin Solomons' flat in Gullhaven Court before the shooting. Oddly enough, Maudlin Solomons was also not asked about this. The fact might not have been apparent from the witness statements in defence counsel's possession, but I would have thought that the prosecutor should have been aware of the evidence in that regard that was going to be adduced from Cherel Brandt.

[197] Be that as it may, there were two indications in the evidence that supported the probability that Ms Brandt's evidence that Anthony had come to the 'blad' from the party was true. Firstly, it was put to Anthony on accused 1's behalf that Ms Solomons was in a relationship with him. The proposition was denied, but it is nevertheless unlikely that a basis for it would have arisen if there were no connection whatsoever between the two even if, in reality, it was only a non-romantic friendship. The evidence gave a clear impression that Robinvale is a small community in which most people knew most of the other residents, where they lived, and who their connections were. Secondly, Wayne Florence, whom both Anthony and Solomons said they had not seen on the evening in question, testified that he saw Anthony emerge from emerge from Gullhaven Court as he and Melicia Claasen approached.

[198] Considering the evidence holistically, which, of course, was something that I was unable to do when Anthony gave his evidence at the beginning of the trial and I was possessed with the most meagre summary by the state of the material facts that I have ever seen, I consider it is probable that there was something that Anthony and Ms Claasen wanted to discuss tête-à-tête

when they met that evening. I think this may be deduced from the fact that Ms Solomons testified that she was asked to stand aside while the conversation took place and that Florence, who was accompanying Ms Claasen at the time, also went on a way without her when they encountered Anthony, and a discussion between Anthony and Claasen ensued.

[199] Ms Solomons' evidence was that while she was at the party in Gullhaven Court Melicia Claasen had contacted her by phone to tell her that she would be coming that way. It is quite feasible that Maudlin Solomons would have mentioned the phone call to Anthony if he was there, as, for the reasons just given, I believe he was. That would explain how both Anthony and Solomons emerged from Gullhaven Court just as Melicia Claasen approached the area of the 'blad' opposite those flats. The purpose of Melicia Claasen's expedition to that area was, according to Florence, to purchase dagga from the Rastafarians near Flamingo Park. Ms Solomons' evidence corroborated that of Florence. She said that Ms Claasen had told her on the phone that she was going to get '*'n rokie*' (something to smoke) from the Rastafarians. The reference to the '*rokie*' could well explain why Ms Brandt was under the impression that Anthony and Ms Solomons had gone outside for a smoke. She could well have misheard the explanation for them leaving the party when she testified that she understood that they had gone outside for a cigarette. If the two had gone outside to speak to Melicia Claasen it would give a more plausible basis for Ms Solomons to have told Ms Brandt that they would let her know when she could come outside and join them.

[200] I consider that the evidence of Anthony and Ms Solomons said that they had not seen Florence that evening is explicable.

[201] Florence was surprised to hear that Anthony did not recall having seen him. He said that he had greeted Anthony. Florence's surprise at the proposition was evident in the witness box and appeared genuine. The encounter was probably a fleeting one and Anthony could well have forgotten it. It was hardly something he would have regarded as a significant event at the time, and one does not know if he knew that Florence would be a witness in the case. One does not know if he was even conscious that Ms Claasen had been walking together with Florence at the time. The evidence suggested that the area around the 'blad' was buzzing with people at the time.

[202] The same observation goes for Ms Solomons. She could easily have missed spotting Florence amongst all the other people as she saw Melicia Claasen approach from the direction of

the shop. We do not know how close or far apart from one another Florence and Ms Claasen were as they walked together. If all that Florence did was to greet Anthony, Solomons could easily not have noticed that in the given circumstances.

[203] The evidence of Anthony and Ms Solomons that they did not see Florence supports the idea that their testimony was based on their independent recollections and detracts from the suggestion raised from time to time during the trial that the evidence against the accused was an organised fabrication. In this regard I should also mention, of course, that Florence also testified that he had not seen Ms Solomons that evening. Ms Solomons testified that she had not seen Cecilia Hartenberg that evening, and we know from the fact that Cecilia was caught in the shooting that she must have been in the vicinity. There were other indications that the individual eyewitnesses' evidence was not affected by that of the others. Ms Solomons, for example, was adamant that she did not agree with the evidence given by Anthony concerning the position of his assailants relative to one another. She was definite that the two persons who approached Anthony were side by side and not one four or five metres behind the other. The forensic evidence concerning the recovery of the cartridges tends to support the correctness of her observation. She was also adamant that Anthony was incorrect to think that accused 3 was 'Ses'.

[204] I should record that I have been particularly careful to look out for assurances of independence in the testimony of the eyewitnesses because I am astute to the danger in gang ridden context of the Robinvale community that incidents like those involved in this case can be susceptible to manipulation for ulterior purposes as was suggested in the cross-examination by the accused's legal representatives.

[205] As described earlier, Ms Solomons gave two partly inconsistent statements concerning whom she had seen involved in the attack on Anthony. Neither of the statements was put in evidence, but it was apparent that accused 1, 2 and 3 were named in the statement she made on the same night as the shooting and accused 1, 3 and Saardje in the later statement. The first statement was made so soon after the incident that it was unlikely to have been influenced by extraneous considerations. It is not a matter of prior consistent statement, but rather one of early identification. However, there is no escaping her subsequent contradictions on the issue. Her claimed confusion in the photo ID parade was also unconvincing.

[206] I have little reason to doubt that Ms Solomons was an eyewitness to the events, as she testified, but the conflict between her statements does call into question the reliability of her identification. It has only been in respect of her identification of accused 1 that she has been consistent. However, even in that respect I would be inclined, on account of the evident flaws in her testimony, to accept her identificatory evidence only to the extent that it was independently supported by the acceptable evidence of the other eyewitnesses. Her consistent identification of accused 1 is supported by the evidence of Florence and Ms Brandt.

[207] I reviewed Florence's evidence earlier in the judgment. Apart from the unconvincing nature of his claim not to know what the gang warfare between the Terribles and the Horribles was about, he was a satisfactory witness whose evidence was not shaken in any material aspect in cross-examination. It weighs with me that he was candid about his ability to recognise only one of the two shooters, and he gave a plausible reason for that. His evidence about the relative positions of the actors on the 'blad', i.e. Ryno Anthony, Melicia Claasen and the two shooters is supported by the objective evidence. I have already identified aspects of the other eyewitness evidence that in my judgment lends assurance to the independence of his testimony. He was well acquainted with accused 1 and assuming the visibility conditions were good enough – a matter to which I shall come- would have no difficulty recognising him if he saw him.

[208] I have also reviewed Ms Brandt's evidence. It is clear that I found her to be an honest witness. Her evidence directly implicates accused 1 and 3 in the shooting at the 'blad'. Her evidence concerning accused 2 would not sustain convicting him of the charges of murder and attempted murder related to the shooting at the 'blad'. She had him coming on the scene only after the shooting had stopped. Although the evidence suggests that accused 2 was probably privy to the actions of the shooters and supported them, his described behaviour does not satisfy the requirements that would need to be satisfied to hold him guilty on the basis of the doctrine of common purpose; see *S v Mgedezi* 1989 (1) SA 687 (A); [1989] 2 All SA 13, at 705I-706C (SALR), endorsed by the Constitutional Court in inter alia *S v Makhubela and Another* [2017] ZACC 36 (29 September 2017), 2017 (2) SACR 665 (CC); 2017 (12) BCLR 1510 (CC). An act of approbation after the event does not suffice. The evidence also does not establish that the firearm that Ms Brandt saw Accused 2 wielding was in fact a firearm or that it was loaded.

[209] Accused 2 will therefore be acquitted on counts 2 to 8. I shall deal with his position in respect of the charges under the Prevention of Organised Crime Act in count 1 presently.

[210] The evidence of Ms Brandt incriminates accused 1 as one of the shooters on ‘the blad’. Her identification of the accused is independently supported by the evidence of two other eyewitnesses. I have indicated that I consider one of those witnesses, Florence, to have been a satisfactory witness. Insofar as the other witness, Solomons, was a less than satisfactory witness in many respects, her early identification of accused 1 as one of the culprits cannot be ignored as a factor, counting in support of his identification by the other two satisfactory witnesses even if it would not have carried the day had it stood by itself.

[211] As I have recorded, the accused was well known to all three of the witnesses who identified him. There was, however, understandably, great focus by the defence on the visibility conditions at the time. It is regrettable that the state in such cases, in which visibility conditions are very foreseeably going to be an important issue, regularly fails to call expert meteorological or astronomical evidence to provide the court with an objective and more definitive basis to assess the position. Such evidence would be admissible in affidavit form in terms of s 212 of the Criminal Procedure Act. In the current case the state did not even avail of the machinery afforded by s 229 of the Criminal Procedure Act.

[212] It is evident that the shooting on the ‘blad’ happened at approximately 9 o’clock in the evening. It was common cause, and in any event readily ascertainable from any number of authoritative published sources, that the sun sets in the Western Cape just after 8 o’clock at that time of the year. It is also well known that in mid-summer sunset here is followed by a fairly prolonged period of twilight. Several of the witnesses described the prevailing conditions as twilight. Only Ms Solomons suggested that it was ‘very dark’. But even on Ms Solomons’ evidence the darkness was not such as to prevent her from being able to see the two approaching men at some distance even if she was not at first able to see them clearly enough to recognise them. I am disposed on account of my long-time experience as an inhabitant of this part of the world to accept the evidence of most of the eyewitnesses that darkness had not completely closed in. It must be nonetheless be acknowledged that it had become dark enough for the flashes caused by the firing of the weapons to show up, as described Florence.

[213] It is apparent from the evidence that the ambient lighting conditions were assisted by artificial illumination. It appears from the photographs and was confirmed in the oral testimony that street lighting illuminates at least part of the 'blad'. It is also apparent that one was able to see at least as far as between Gullhaven Court and the place where the Rastafarians were, which as I have mentioned was at least 20 m. There was much activity going on on and around the 'blad'. It is most improbable that that would have been occurring in anything like conditions of total darkness. It is significant that when Florence testified that he was able to identify only one of the two gunmen, he said it was because of the angle of vision, not because of the lighting conditions. There was a close correspondence between the various witnesses as to the place on the 'blad' where they saw Melicia Claasen and Ryno Anthony in conversation together. I do not think that was coincidental; it was because of the witnesses ability to see where they were.

[214] Maudlin Solomons was able to recognise Melicia Claasen from sufficient distance to be able to say that she had approached from the direction of the shop. Cherel Brandt was able to see well enough to describe that the two gunmen and the person who joined them after the shooting ran away and disappeared down the lane that runs near the shop between Bunting Crescent and Courser Avenue. It is also apparent that the visibility was good enough for the shooters to be able to zero in on their target from some distance away. Everything, including the evidence of the accused themselves, suggests that Anthony was not a random victim. I am satisfied that that there was sufficient visibility for the witnesses to be able to make reliable identifications. The position would have been assisted by the witnesses' familiarity with the persons they purported to identify. In Cherel Brandt's case she had the suspects in sight for long enough to diminish the possibility of a mistaken identification almost to the point of exclusion. Evidence of three independent identifications of the same person, in the case of accused 1, lends further support to the conclusion that the visibility was sufficiently good and that the identification was not mistaken. The cumulative effect of all the forementioned considerations has informed my conclusion.

[215] In all the circumstances I am satisfied beyond reasonable doubt that accused 1 was reliably identified as one of the shooters. I have already described the poor quality of the accused's evidence and that of his father. The weakness of that evidence affords good reason to reject it. As Nugent J pointed out in *Van der Meyden* supra, at p. 81F-G, '(e)*vidence which incriminates the accused, and evidence which exculpates him, cannot both be true – there is not*

even a possibility that both might be true – the one is possibly true only if there is an equivalent possibility that the other is untrue. There will be cases where the State evidence is so convincing and conclusive as to exclude the reasonable possibility that the accused might be innocent, no matter that his evidence might suggest the contrary when viewed in isolation'. In the current case the weight of the evidence of three witnesses independently identifying the accused as one of the shooters is compelling, and against it the alibi evidence of the accused and his father was of demonstrably weak quality. Assessing the evidence in its totality, I am able safely to reject the alibi evidence of accused 1 as being not reasonably possibly true.

[216] The evidence does not establish that it was the bullets fired by accused 1 as opposed to those fired by the other shooter that caused the injuries to the deceased and the complainants on counts 4 and 5. That is of no consequence, however. It is clear that the shooting was a concerted action by both shooters. The evidence establishes the requirements for the doctrine of common purpose to apply. The shooters were clearly intent on shooting Ryno Anthony. The evident intention was to kill him. What else could be the object in firing a hail of bullets at him?

[217] It is probably so that the shooters had no actual intention to kill or injure Cecilia Hartenberg or Brandon Graaf and possibly also not Melicia Claasen, but they must have appreciated that firing a fusillade of bullets in a relatively crowded area was liable to cause death or serious injury to bystanders, and they proceeded to do just that reckless of the potential consequences. In the circumstances I am satisfied that the evidence established a so-called *dolus indeterminatus* or general intention to kill; cf. *S v Nlapho* 1981 2 SA 744 (A) at 751 and *S v Nkombani and Another* 1963 (4) SA 877 (A) at 891H-892A (per Rumpff JA) and 894E-H (per Holmes JA). Moreover, the killings were committed in the execution of a common purpose as provided in para (d) s.v. 'murder' in Part I of Schedule 2 to the Criminal Law Amendment Act 105 of 1977. Accused 1 will therefore be convicted on counts 2, 3, 4 and 5 in the indictment.

[218] The evidence also establishes that both shooters were armed with functioning firearms loaded with 9mm Parabellum ammunition. Accused 1 has not rebutted the presumption created in terms of s 250 of the Criminal Procedure Act. In the circumstances his guilt on counts 7 and 8 concerning the unlawful possession of a firearm and ammunition has also been established. The joint possession of each of the shooters of the other's firearm has not been established in the sense explained by Marais J in *S v Nkosi* 1998 (1) SACR 284 (W) and subsequently endorsed by

the appeal court in *S v Ramoba* 2017 (2) SACR 353 (SCA) at para 11, amongst others; and by the Constitutional Court in *S v Makhubela and Another* supra, at para 46-57. The conviction therefore bears only on the firearm he was bearing at the time of the shooting and the ammunition that was in it.

[219] Accused 3 was reliably incriminated only by the evidence of Cherel Brandt. The incriminating evidence against him by Maudlin Solomons was unsatisfactory for the reasons described earlier in this judgment. Unlike the position with regard to accused 1, Cherel Brandt's evidence against accused 3 was not buttressed by the acceptable evidence of any other witness. Although I found accused 3 to be an unconvincing witness in material respects and also identified various improbabilities in the supporting evidence given by his mother, I was not able, despite my considerable doubt as to its truth, to reject their evidence as not reasonably possibly true. The position in which I found myself was a living example of that postulated by Van Coller AJA in *Van Eck* supra, where the evidence for the state did not weigh sufficiently 'overwhelmingly' against that of the defence for me to be able to reject the latter even though I was inclined not to believe it. Accused 3 will be acquitted and discharged on all counts.

[220] It is time now to consider in regard to accused 1 and 2 the charges brought in count 1 under s 9 of the Prevention of Organised Crime Act. The main charge alleges a contravention of s 9(2)(a); a contravention of s 9(1)(a) is alleged in the alternative charge.

[221] Section 9(1)(a) provides:

> 'Any person who actively participates in or is a member of a criminal gang and who-
>
> (a) wilfully aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang;
>
> …
>
> shall be guilty of an offence.'

The term 'criminal activity' is not defined. It must bear its ordinary meaning which is 'activity that constitutes a crime'. The expression 'aids and abets' connotes the giving of assistance. Claassen, *Dictionary of Legal Words and Phrases* s.v. '*Aid and abet*' explains the import of the expression as follows: '*If a person assists in or facilitates the commission of a crime, if he gives counsel or encouragement, if, in short, there is any co-operation between him and the criminal, then he "aids" the latter to commit the crime (R v Van Niekerk 1944 EDL 202*)'.

[222] Section 9(2)(a) provides:

> '(2) Any person who-
>
> (a) performs any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity;
>
> shall be guilty of an offence.'

The expression '*pattern of criminal gang activity*' is defined in s 1 as follows:

> 'pattern of criminal gang activity' includes the commission of two or more criminal offences referred to in Schedule 1: Provided that at least one of those offences occurred after the date of commencement of Chapter 4 and the last of those offences occurred within three years after a prior offence and the offences were committed-
>
> (a) on separate occasions;
>
> (b) on the same occasion, by two or more persons who are members of, or belong to, the same criminal gang.'

[223] I find it convenient to deal with the charges under count 1 following the sequence of the provisions of the section, dealing first with s 9(1)(a) and then moving on to s 9(2)(a).

[224] The provisions of s 9 are not a model of clarity and the difficulties attending their interpretation have been commented on in previous judgments: *S v Peters and Another* [2013] ZAWCHC 218 (4 November 2013) in para 88-95, *S v Jordaan and Others* [2017] ZAWCHC 132 (16 November 2017); 2018 (1) SACR 522 (WCC) in para 134-136 and *S v Solomon and Others* [2020] ZAWCHC 116 (29 September 2020) in para 902-925, and see also Professor CR Snyman's article, '*Die nuwe statutêre misdaad van deelname aan 'n kriminele bande*' (1999) 12 SACJ 213.

[225] Professor Snyman argues, and I incline to agree, that s 9(1) of the Act covers the same ground as other long subsisting offences under the common law. He points out that the behaviour described in paragraphs (a) to (c) of the subsection could equally amount to involvement in the principal crimes involved under the doctrine of common purpose or by way of attempt, conspiracy or incitement. Professor Snyman opines that s 9(1) serves no practical purpose and is a high-sounding superfluity. Of direct relevance in the current context, however, is the feature I discussed in *S v Peters* supra loc cit; namely, that a principal actor cannot be convicted of aiding and abetting his own offence. The 'criminal activity' in which accused 1 was engaged, and in respect of which he is to be convicted on counts 2-5 and 7-8, was committed by him, he did not

'aid and abet' the commission of those crimes. He cannot therefore be convicted of contravening s 9(1)(a). The only cogent evidence implicating accused 2 in the shooting at the 'blad' went to his conduct after the event. On any approach it did not establish that he had aided and abetted the commission of the criminal activity that was involved in the shooting. Accordingly, he also cannot be convicted on the alternative charge in count 1.

[226] Turning now to the main charge, under s 9(2)(b). Citing the (unsigned) Afrikaans text, which employs the word '*ook*' in place of the English text '*includes*', Professor Snyman considers that the defined meaning of the expression is not exclusive of a meaning of the term arrived at on the application of the ordinary meaning of the words that make it up. I do not find it necessary to reach any conclusion on that opinion. On the one hand, if the ordinary meaning of the words were intended to apply, it is difficult to conceive what the object of the legislature was in devising the rather cumbersome and complicated special definition of the expression. On the other hand it is difficult to see how anyone could do something to bring about a pattern of criminal gang activity when the definition of such activity is predicated on historical rather than future events. Whatever the position, I agree with Professor Snyman that the words '*which is aimed at*' (Afriks. '*wat daarop gemik is*') imply that a person charged with s 9(2)(a) must be shown to have intended their act to cause, bring about, promote or contribute towards a pattern of criminal gang activity. In other words, it is the subjective intention of the accused charged with a contravention of s 9(2)(a) that must be established, not the objectively determined effect of his or her act. This construction of the provisions does not have the effect of the stultifying the obvious legislative intention of penalising criminal activity by members of criminal gangs committed within the context of their gang membership. That object is served by the provisions of s 10(3) of the Act, which bears on sanction.

[227] In the current case the indictment made it plain that the 'pattern of criminal gang activity' relied upon by the state was the commission of the offences alleged in counts 2-8. The indictment clearly indicated that the state relied on the defined meaning of the expression. As there will be no conviction in respect of the charge on count 6, and as the identity of the second shooter involved in counts 2-5 was not proven beyond reasonable doubt, and furthermore as the offences subject of counts 2-5 and 7 and 8 were committed on the same occasion, the requirement in para (b) of the definition of 'pattern of criminal gang activity' was not established. The alleged acts therefore were not shown to have caused the alleged pattern of

criminal gang activity. But even if the expression were given a meaning wider than its statutorily defined one, I do not consider that it was established that accused 1 or 2 had the required intention to commit the statutory offence of 'bringing about, promoting or contributing towards a pattern of criminal gang activity'. Accused 1 and 2 will therefore also be acquitted on the main charge of contravening s 9(2)(a).

[228] The order of the court is therefore as follows:

1. Accused 1 (Anthonio Booysen**)** is found guilty and convicted on counts 2 and 3 (two counts of murder), counts 4 and 5 (two counts of attempted murder), and on counts 7 and 8 (contravening s 3 and s 90, respectively, of the Firearms Control Act 60 of 2000, 'unlawful possession of a firearm and an undetermined number of rounds of ammunition').
2. Accused 1 is found not guilty and acquitted on count 1 (contravening s 9 of the Prevention of Organised Crime Act 121 of 1998) and count 6 (the attempted murder of Jenene Rhodes).
3. Accused 2 (Nadiem Thorpe) is found not guilty and acquitted on all counts.
4. Accused 3 (Cheslyn Johnson) is found not guilty and acquitted on all counts.

A.G BINNS-WARD

Judge of the High court